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The advent and increasing sophistication of medical technology, which allows the detection of birth defects *in utero*, has resulted in recognition of two tort claims unknown at common law: wrongful birth and wrongful life.[1] There is an emerging trend in the state legislatures and courts toward rejection of wrongful birth and wrongful life causes of action.[2] This article provides a critical analysis that supports the rejection of wrongful birth/wrongful life causes of action.

A wrongful birth action is brought by parents seeking damages for the birth of a "defective" child. The parents allege that they would have aborted the child if the defendants, health care personnel, had properly advised them of the risks of birth defects. The defendants are charged with: (1) failing to perform diagnostic tests

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1. Comment, *Liability for Negligent Prenatal Diagnosis: Parents' Right to a "Perfect" Child?*, 42 OHIO ST. L.J. 551, 571 (1981) [hereinafter Comment, *Liability for Negligent Prenatal Diagnosis*]; Comment, *Wrongful Life: The Tort That Nobody Wants*, 23 SANTA CLARA L. REV. 847, 849 (1983); Smith v. Cote, 128 N.H. 231, 239, 513 A.2d 341, 345 (1986).

2. *See, e.g.*, 42 PA. CONS. STAT. § 8305 (1988); MO. REV. STAT. § 188.130 (1986); MINN. STAT. § 145.424 subd. 2 (1984); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988); Spencer v. Seikel, 742 P.2d 1126 (Okla. 1987); Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986); Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983).

which could have revealed the child's disabilities before birth; (2) negligently performing diagnostic tests; or (3) failing to accurately advise the parents of test results. The parents claim this negligence deprived them of the opportunity to abort the defective fetus. They seek recovery for their emotional distress and for the exceptional medical and educational expenses of rearing the child.[3]

As of September, 1988, courts of appeal in seventeen (17) states have accepted the wrongful birth claim.[4] Federal courts in three (3) states have accepted the claim based upon their interpretation of state law.[5] Appellate courts in four (4) states have rejected the wrongful birth claim.[6] One state supreme court (Minnesota) has upheld the constitutionality of a statute prohibiting the wrongful birth claim.[7]

The wrongful life action is distinct from the wrongful birth action in that a wrongful life claim is brought by or on behalf of a child with disabilities. The alleged negligence is the same—the failure to test, detect, or warn of fetal defects. The child claims that its very existence is a legal wrong, and that, but for the negligence of the defendant doctor or health care provider, the plaintiff/child would have been aborted. The child claims damages for pain and suffering during his life, and for the exceptional expenses associated with medical care and education during his life time.[8]

As of September, 1988, state courts of appeal in five (5) states have accepted the wrongful life claim,[9] whereas it has been rejected

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3. Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 477, 656 P.2d 483, 494 (1983).

4. Andalon v. Superior Court, 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984); Haymon v. Wilkerson, 535 A.2d 880 (D.C. 1987); Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984); Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984) (overturned by statute); Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984), *aff'd*, 113 Ill. 2d 482, 499 N.E.2d 406 (1986); ME. REV. STAT. ANN. tit. 24, § 2931(2)(1985); Eisbrenner v. Stanley, 106 Mich. App. 357, 308 N.W.2d 209 (1981); Kingsbury v. Smith, 122 N.H. 237, 442 A.2d 1003 (1982); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, (1978); Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Payne v. Myers, 743 P.2d 186 (Utah 1987); Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

5. Robak v. United States, 658 F.2d 471 (7th Cir. 1981); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Phillips v. United States, 575 F. Supp. 1309 (D.S.C. 1983).

6. Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) (in dictum); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986); Spencer v. Seikel, 742 P.2d 1126 (Okla. 1987).

7. Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986).

8. *See, e.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

9. Turpin v. Sortini, 31 Cal. 3d. 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Conti-

by courts of appeal in sixteen (16) states.[10] One federal court has rejected wrongful life actions.[11] One (1) state supreme court (Minnesota) has upheld the constitutionality of a statute prohibiting wrongful life claims.[12]

While the wrongful life claim has been frequently rejected, the wrongful birth action is gaining acceptance.[13] Both actions are similar in two respects. First, an essential element in each action is the contention that the parents would have aborted their child if informed of fetal defects. This introduces into any bioethical evaluation of these actions the ethical issues surrounding abortion.[14] Second, both claims rely on a fundamental jurisprudential position that a life itself, if defective, can be a legal wrong, a "damage" to the parents of that life and the child who lives it.[15] The alternative

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nental Casualty Co. v. Empire Casualty Co., 713 P.2d 384 (Colo. Ct. App. 1985); Siemieniec v. Lutheran Gen. Hosp., 134 Ill. App. 3d 823, 480 N.E.2d 1227 (1985); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).

See also Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988). The Louisiana Supreme Court has recognized, in dicta, a very limited form of wrongful life action: "Logic and sound policy require a recognition of a legal duty to a child *not yet conceived* but *foreseeably harmed* by the negligent delivery of health care services to the child's parents." *Id.* at 1157 (emphasis added). In *Pitre*, a child with a disability (albinism) was born following a negligently performed tubal ligation. The court held that albinism was not a foreseeable harm for which the physician should be held liable.

10. Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984); Goldberg v. Ruskin, 113 Ill. 2d 482, 499 N.E.2d 406 (1986); Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) (in dictum); Eisbrenner v. Stanley, 106 Mich. App. 357, 308 N.W.2d 209 (1981); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988); Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986); Alequijay v. St. Luke's-Roosevelt Hosp. Center, 63 N.Y.2d 978, 473 N.E.2d 244, 483 N.Y.S.2d 994 (1984); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986); Spencer v. Seikel, 742 P.2d 1126 (Okla. 1987); Ellis v. Sherman, 512 Pa. 14, 515 A.2d 1327 (1986); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

11. Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980).

12. Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986).

13. 7 CAUSES OF ACTION 589, *Cause of Action for Wrongful Birth or Wrongful Life* § 4 (1985) [hereinafter CAUSES OF ACTION].

14. *See generally* Reich, *Life: Quality of Life*, in 2 ENCYCLOPEDIA OF BIOETHICS 829 (W. Reich ed. 1978). Reich notes that arguments for abortion based on a benefit to the unborn child, as in the wrongful life context, raise "the problem of whether an individual can really be the beneficiary of an action that terminates its very existence." *Id.* at 837 (citing Camenisch, *Abortion: For the Fetus's Own Sake?*, 6 HASTINGS CENTER REP. 38, 39 (Apr. 1976)).

15. *Id.* Reich notes that the premise of wrongful birth and wrongful life actions, that a life can be a "wrong," "raises several objections: how and under what conditions existence itself can be an injury, and the impossibility of measuring damages equitably against intangible benefits associated with life." *Id.* at 837 (citing Comment, *Wrongful Birth: The*

to this "wrong" is the termination of the developing life through abortion. This characteristic of these tort claims introduces into a bioethical evaluation the issues of "value of life"[16] and "quality of life."[17]

Wrongful birth and wrongful life claims must be distinguished from two other claims: wrongful conception and wrongful pregnancy. Both of these claims have been accepted under traditional common law personal injury analysis. Generally, wrongful conception is a claim brought by parents against the physician for the pregnancy and birth of a nondisabled child following a negligently performed sterilization or contraception procedure. As of September, 1988, courts of appeal in thirty (30) states and the District of Columbia have accepted the wrongful conception claim,[18] and one (1) federal court has accepted the claim.[19] One (1) state court has rejected the claim.[20] Of those that recognize the claim, courts in seven (7) states have allowed damages for the ordinary expenses of

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Emerging Status of a New Tort, 8 ST. MARY'S L.J. 140, 140-159 (1976)).

16. *E.g.*, Miller v. Johnson, 231 Va. 177, 181, 343 S.E.2d 301, 303 (1986); *see also* Bruggeman v. Schimke, 239 Kan. 245, 248, 718 P.2d 635, 638 (1986).

17. *See generally* Singer, *Life: Value of Life*, in 2 ENCYCLOPEDIA OF BIOETHICS 822 (W. Reich ed. 1978).

18. Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); University of Ariz. v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983); Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982); Flowers v. District of Columbia, 478 A.2d 1073 (D.C. 1984); Ramey v. Fassoulas, 414 So. 2d 198 (Fla. Dist. Ct. App. 1982); Fulton-DeKalb Hosp. Auth. v. Graves, 252 Ga. 441, 314 S.E.2d 653 (1984); Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983); Garrison v. Foy, 486 N.E.2d 5 (Ind. Ct. App. 1985); Byrd v. Wesley Medical Center, 237 Kan. 215, 699 P.2d 459 (1985); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988); Macomber v. Dillman, 505 A.2d 810 (Me. 1986); Sard v. Hardy, 281 Md. 432, 379 A.2d 1014 (1977); Clevenger v. Haling, 379 Mass. 154, 394 N.E.2d 1119 (1979); Clapham v. Yanga, 102 Mich. App. 47, 300 N.W.2d 727 (1980); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Miller v. Duhart, 637 S.W.2d 183 (Mo. Ct. App. 1982); Szekeres v. Robinson, 102 Nev. 93, 715 P.2d 1076 (1986); Kingsbury v. Smith, 122 N.H. 237, 442 A.2d 1003 (1982); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (1981); O'Toole v. Greenberg, 64 N.Y.2d 427, 477 N.E.2d 445, 488 N.Y.S.2d 143 (1983); Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); Goforth v. Porter Medical Assocs., Inc., 755 P.2d 678 (Okla. 1988); Mason v. Western Pa. Hosp., 499 Pa. 484, 453 A.2d 974 (1982); Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987); McKernan v. Aasheim, 102 Wash. 2d 411, 687 P.2d 850 (1984); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

19. Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983). Gallagher v. Duke Univ., 852 F.2d 773 (4th Cir. 1988), although characterized as a wrongful conception action by the court, is not included here because it is not a wrongful conception action as herein defined.

20. Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).

rearing and educating the child.[21] The wrongful conception claim has been recognized under the following titles: medical malpractice (negligence), wrongful conception, wrongful pregnancy, wrongful birth, breach of contract, trespass and assumpsit.

Wrongful pregnancy is a claim brought by the parents against a physician for the pregnancy and birth of a nondisabled child following a negligently performed abortion procedure. As of September, 1988, courts of appeal in five (5) states have accepted the wrongful pregnancy action.[22] No state or federal court has rejected the action. No state or federal court has allowed damages for child rearing or education. This cause of action has been recognized under the following titles: wrongful pregnancy, malpractice, wrongful birth, trespass and assumpsit.

Wrongful conception and wrongful pregnancy are distinct from wrongful birth and wrongful life claims because the pregnancy and delivery are asserted to be the wrong, not the resulting life. Damages are usually limited to the pain and suffering of pregnancy and delivery, lost wages, and loss of consortium.[23] Damages for child rearing and education are usually not allowed on the theory that a healthy human life is not a legal wrong or injury to the parents.[24] By contrast, where wrongful birth and wrongful life claims are recognized, damages for the exceptional costs of rearing and educating a child with disabilities are always allowed. In wrongful conception and wrongful pregnancy cases, the ethical and philosophical problems in preferring non-existence to existence, implicit in wrongful birth and wrongful life claims, are thus avoided. Moreover, since the abortion choice is not involved, abortion issues are

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21. University of Ariz. v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982); Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (Ct. Spec. App. 1984); Clapham v. Yanga, 102 Mich. App. 47, 300 N.W.2d 727 (1980); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

22. Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979); Morse v. Soffer, 101 A.D.2d 856, 476 N.Y.S.2d 170 (N.Y. App. Div. 1984); Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981); Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986).

23. *E.g.*, Miller v. Johnson, 231 Va. 183, 183-84, 343 S.E.2d 301, 305 (1986) (allowing recovery for medical expenses, pain and suffering, lost wages, and emotional distress directly resulting from the negligently performed abortion, the continuing pregnancy, and the ensuing birth); Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982) (compensation for medical expenses, pain and suffering, and mental anguish as a result of pregnancy, as well as for the loss to husband of the comfort, companionship, services, and consortium of the wife during her pregnancy and immediately after birth).

24. *See* cases cited in *Miller*, 231 Va. at 183-86, 343 S.E.2d at 305-06.

not raised by the wrongful conception/pregnancy claim.[25]

Wrongful conception and pregnancy actions are distinct in another aspect. Such claims involve the birth of a normal but *unwanted* child. The typical wrongful birth/life action involves parents who initially desire a child, but do not produce a child meeting the desired "quality" standards.[26] Thus, a distinction between the value of a nondisabled child and a child with disabilities is inherent in wrongful birth/life. No cause of action arises if, in spite of a doctor's negligence, a nondisabled child is born. It is only when a child with disabilities is born that the birth or life is "wrongful." This "quality of life" distinction is usually not implicated in the wrongful conception and pregnancy claims.

In essence, wrongful conception and wrongful pregnancy fall within traditional common law torts relating to medical malpractice or negligence. They require no new legal theories. However, wrongful birth and wrongful life claims do require a new legal theory, because life itself is considered a wrong, and death is preferred over life with disabilities. By deviating from the general principle in the law that life, even with disabilities, is valuable and that only wrongful death is compensable, wrongful birth/life actions are a radical departure from existing law.

I. There is No Constitutional Basis for Wrongful Birth and Wrongful Life Causes of Action

Prior to the 1973 decision by the United States Supreme Court in *Roe v. Wade*,[27] wrongful birth/life and wrongful pregnancy ac-

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25. *Boone*, 416 So. 2d at 724 (Faulkner, J., concurring specially) ("The resolution of the question of a physician's liability for wrongful pregnancy . . . does not require 'intrusion into the domain of moral philosophy.' . . . [T]he purpose of an action for wrongful pregnancy [conception] is not to recover for the *life of the child*."). In wrongful pregnancy actions, the issue is not failure to inform of an abortion choice, but medical malpractice for negligence in the abortion procedure under traditional tort principles. *Miller*, 231 Va. at 182, 343 S.E.2d at 304.

26. *See* Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 570. Unlike the parents in the wrongful conception/pregnancy cases involving a "healthy but unwanted" child, the parents in wrongful birth cases:

> did not engage the defendant's services for the purpose of preventing reproduction, but for furthering the normal process of pregnancy. . . . [T]hey were ready and willing to assume the financial burdens normally associated with raising a child. . . . [T]he gravamen of the complaint is that they were denied the opportunity to avoid the birth of this specific child with its specific 'defect.'

Id. See also Capron, *Tort Liability in Genetic Counseling*, 79 Colum. L. Rev. 618, 638 n.91 (1979) [hereinafter Capron].

27. 410 U.S. 113 (1973).

tions were generally unsuccessful, one reason being the then-prevailing public policy against abortion.[28] With the *Roe* Court's enunciation of a woman's privacy right which protected the abortion decision from state criminal prosecution, wrongful birth claims were recognized by some courts on the theory that the negligence of the health care provider had infringed on this private, protected choice.[29] Commentators are nearly unanimous in concluding that *Roe v. Wade* provided the legal springboard for the wave of wrongful birth actions that subsequently appeared.[30] This conclusion is supported by the language and citations to *Roe* found in the decisions which recognized the new cause of action.[31]

For example, one such opinion in *Berman v. Allan*[32] noted that "[t]he Supreme Court's ruling in *Roe v. Wade* . . . clearly establishes that a woman possesses a constitutional right to decide whether her fetus should be aborted. . . . Public policy now supports, rather than militates against, the proposition that she not be

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28. Stewart v. Long Island College Hosp., 35 A.D.2d 531, 313 N.Y.S.2d 502 (N.Y. App. Div. 1970), *appeal dismissed*, 27 N.Y.2d 804, 264 N.E.2d 354, 315 N.Y.S.2d 863, *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (wrongful birth /life); Gleitman v. Cosgrove, 49 N.J. 22, 41, 227 A.2d 689, 699 (1967) (Francis, J., concurring)(wrongful birth / life); Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934) (wrongful pregnancy); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957) (wrongful pregnancy).

29. Speck v. Finegold, 497 Pa. 77, 85, 439 A.2d 110, 114 (1981) (*per curiam*) (Flaherty, J.) ("[R]eliance on the Commonwealth's public policy favoring birth over abortion . . . cannot succeed because it squarely conflicts with the plaintiff's constitutional right as articulated in *Roe v. Wade*."); Berman v. Allan, 80 N.J. 421, 430-31, 404 A.2d 8, 14 (1979); Jacobs v. Theimer, 519 S.W.2d 846, 847-48 (Tex. 1975) ("[A]ll of the penal code provisions relative to abortion were declared to be in violation of the United States Constitution in *Roe v. Wade*. . . . So long as no violation of criminal statutes is proposed, the courts should regard the [abortion] question as one to be resolved by the wife and her husband."); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695-96 (E.D. Pa. 1978) (Pennsylvania law); Smith v. Cote, 128 N.H. 231, 236, 513 A.2d 341, 346 (1986); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110, 114 (N.Y. App. Div. 1977), *rev'd in part sub nom.*, Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978)("[I]nherent in the abolition of the statutory ban on abortion . . . is a public policy consideration which gives potential parents the *right* within certain statutory and case law limitations, not to have a child." (emphasis added)).

30. *See, e.g.*, Capron, *supra* note 26, at 635 n.67; 7 CAUSES OF ACTION, *supra* note 13, at 6; Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J. FAM. L. 677, 693 (1983-84); Note, *Wrongful Birth: Who Owes What to Whom and Why*? 40 WASH. & LEE L. REV. 123, 124 (1983); Note, *Harbeson v. Parke-Davis, Inc.: A Major Step Forward in the Evolution of Wrongful Life*, 10 J. CONTEMP. L. 203 (1984) [hereinafter Note, *A Major Step Forward in the Evolution of Wrongful Life*]; Robertson, *Toward Rational Boundaries of Tort Liability For Injury To The Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1453, 1454.

31. *See supra* note 29.

32. 80 N.J. 421, 404 A.2d 8 (1979).

impermissibly denied a meaningful opportunity to make that decision."[33] The opinion alludes to a "constitutional right to abort fetuses" and "Mrs. Berman's loss of her *right to abort* the fetus."[34] This article demonstrates that the "rights" and "interests" balanced in *Roe*, even if accepted for the sake of argument, do not rationally support wrongful birth/life causes of action.

A. *Roe v. Wade Did Not Create a Right to Recover in Wrongful Birth/Life Actions*

In order to facilitate a jurisprudential analysis of the "rights" established in *Roe v. Wade*, it is necessary to define several significantly distinct legal relationships. Wesley Newcomb Hohfeld, in his monumental work *Fundamental Legal Conceptions*,[35] provides a helpful analysis of legal relationships. Hohfeld discerned that what is often indiscriminately deemed a "right" may be, in a given case, any one of four significantly distinct legal relationships: a claim for damages, a privilege, a power, or an immmunity.[36] Hohfeld saw *right* in its proper sense as the first of these four, an affirmative legal claim against another, as in "the right of the plaintiffs" to bring suit.[37] A "right" in the sense of the second category, a *privilege*, is the negation of a legal duty, as a "privilege against self-incrimination" in the face of a duty to testify fully and truthfully.[38] A "right" falls into the category of a *power* when it is a legal ability, as, for example, when the holder of a property right of alienability has the legal power to transfer his interest.[39] The right as an *immunity* is an exemption, a freedom from legal liability.[40]

In delineating the nature of these types of rights, Hohfeld described an opposite and a jural correlative for each.[41] The opposite

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33. *Id.* at 431-32, 404 A.2d at 14.
34. *Id.* at 432-33, 404 A.2d at 14.
35. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1919) [hereinafter HOHFELD].
36. *Id.* at 36.
37. *Id.* at 43.
38. *Id.* at 46.
39. *Id.* at 50-51.
40. *Id.* at 60-62. In sum, "a right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another . . . whereas an immunity is one's freedom from the legal power of 'control' of another as regards some legal relation." *Id.* at 60.
41. "The strictly fundamental legal relations are, after all, *sui generis*; and thus . . . attempts at formal definition are always unsatisfactory . . . . Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of 'opposites' and 'correlatives'." *Id.* at 36. The jural opposites are as follows: right/no-right;

of the right as legal claim is what Hohfeld deemed the "no-right."[42] The corresponding legal relation, or jural correlative, of the right as an affirmative claim is a *duty*.[43] For example, a landowner has an affirmative claim against a trespasser for violating a duty not to enter.[44] The opposite of a *privilege* is a duty.[45] For example, the duty to testify may be negated by a privilege against self-incrimination.[46] The correlative of a privilege is "no-right."[47] Where a trespasser may be privileged to enter land, as of necessity, the landowner has "no-right" to a claim for trespass.[48]

The opposite of *power*, or legal ability, is, obviously, legal disability,[49] and the correlative relation to power is legal liability.[50] The opposite of *immunity* is legal liability, as when a landowner with a tax exemption is immune from taxation, but without such immunity is legally liable for taxes.[51] The jural correlative to an immu-

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privilege/duty; power/disability; immunity/liability. The jural correlatives are as follows: right/duty; privilege/no-right; power/liability; immunity/disability. *Id.* at 36.

42. Hohfeld invented the term "no-right." For example, if party A breaches a contract, B has an affirmative claim, a "right" to compensation. If A never contracted with B, B has "no-right" to damages. A landowner has an affirmative claim against a trespasser, but where no such claim lies, as when a sheriff is privileged to enter, the landowner has "no-right." *Id.* at 38-39.

43. The "invariable correlative of that legal relation which is most properly called a right or claim" is a duty. *Id.* at 39. Where A has a right against B, B has a correlative duty not to violate that right. Where a duty is violated, a right is invaded, just as any injured party has a legal claim against the tortfeasor that caused the injury by breaching the correlative duty. *Id.*

44. *Id.*

45. *Id.* at 36.

46. *Id.* A landowner, by virtue of his property "right," has the privilege of entering his own land, a negation of the duty to stay off would apply to a non-owner. *Id.* at 39.

47. *Id.* at 36.

48. Or, for example, where the sheriff has the privilege to enter the land under a writ of execution, the landowner has no legal right ("no-right") to sue for trespass. If party A has not contracted to work for B, A's privilege of not performing negates any duty to do so. Thus, correlative to A's privilege not to perform is a "no-right" on B's part to claim damages for nonperformance. *Id.* at 39.

49. If a sheriff has the *power* to sell property under a writ of execution, the property owner is subject to a legal disability which cuts off his power, or right, to freely alienate his land. *Id.* at 53.

50. For example, when A has power to accept B's contract offer, there is a corresponding liability on the part of B to be bound by the contract if accepted. *Id.* at 55. When a property owner has a power to alienate his property, the correlative liability to the exercise of that power is the loss of his other property rights. *Id.* at 58. If the sheriff has the power to dispose of the land by tax sale, the landowner is not only under a legal disability to prevent the sale (the opposite of the sheriff's power), but the landowner is also subject to losing his land should the sheriff exercise his power—a liability correlative to the sheriff's power. *Id.* at 60.

51. *Id.* at 60-61.

nity is a legal disability.[52] If a landowner is exempt, or immune, from taxation, the state is under a corresponding legal disability which prevents it from taxing that landowner.

Hohfeld's analysis provides a framework by which the "right" recognized in *Roe v. Wade* may be compared to the "right" essential to a wrongful birth action.[53] The wrongful birth claim represents a right in the strict Hohfeldian meaning of "right"—a legal claim against another for breach of a legal duty. The typical wrongful birth claim applies basic negligence theory. Such a claim alleges a legal duty (Hohfeld's jural correlative) to use reasonable care in genetic screening, testing, or counseling, and a breach of that duty by the defendant, resulting in an affirmative claim, or right to recover, for the resultant damages.[54] In contrast, the "right" of privacy discussed in *Roe v. Wade*, historically and within the operative facts of the case, is a right to be free from state prosecution in "personal" areas such as abortion, or "marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education."[55] Thus, the "right" is, in Hohfeldian

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52. *Id.* at 36, 60. "X, a landowner, has . . . power to alienate to Y or to any other ordinary party. . . . Y is under a disability (i.e., has no power) so far as shifting the legal interest either to himself or to a third party." *Id.* at 60.

53. Hohfeld's delineation of fundamental legal relations is not without application in other areas of modern jurisprudence. *See, e.g.*, Administrative Procedure Act 1, 5 U.S.C. § 706(2)(B) (1977) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional *right, power, privilege,* or *immunity.*" (emphasis added)); Flast v. Cohen, 392 U.S. 83, 119-125 (1968) (Harlan, J., dissenting) (frequent mention of "Hohfeldian plaintiffs" and "non-Hohfeldian plaintiffs" in discussion of standing); *see also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 483-94 (1965); U.S. CONST. art. IV, § 2, cl. 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

Hohfeld's analysis is particularly helpful in the present context, *i.e.*, in determining when a generic "right" gives rise to a cause of action or legal claim. *See, e.g.*, D. LAYCOCK, MODERN AMERICAN REMEDIES 1079-84 (1985). Laycock discusses implied causes of action for constitutional violations and notes that a substantive right, whether granted by the constitution or statute, is distinct from a right of action for a private remedy. To gain a private remedy, one must clear several hurdles. One must have the "right" in strict Hohfeldian terms, that is, a claim or cause of action. One must also have a substantive right, which, in Hohfeldian terms, grants one *freedom* from another's claims or rights, a privilege. One must have the "right" or Hohfeldian "power" to invoke a court's jurisdiction. Finally, if one seeks his remedy against the government, the government must waive its immunity, in Hohfeldian terms, its right to be free from legal liability. Even where Congress or the constitution have operated to create a substantive right, a grant of jurisdiction, and a waiver of immunity, a cause of action may not have been created. *Id.* at 1083 (citing United States v. Testan, 424 U.S. 392 (1976)).

54. 7 CAUSES OF ACTION, *supra* note 13, at 3.

55. Roe v. Wade, 410 U.S. 113, 159 (1973).

terms, a "freedom from the legal power or 'control' " of the state[56] — an *immunity*.

The jural correlative of this immunity enjoyed by citizens is a legal disability on the part of the state to interfere in the protected areas. The jural opposite of the immunity is legal liability for the same acts—if the pregnant plaintiff in *Roe v. Wade* had obtained an abortion in Texas without the immunity granted by the Court, she would have been liable to state prosecution.

Roe did not recognize a right to abort in the sense of an affirmative claim for abortion services with a correlative duty on the part of health care providers to provide those services. Nor did *Roe* create a right to abort in the sense of a legal power, with a corresponding legal liability, which would require others to participate in, or facilitate, the abortion choice.[57] As interpreted by the Court, *Roe* does not require the state to provide abortion services or funding,[58] or remove non-state created obstacles to the abortion choice.[59] Nor does *Roe* require doctors or hospitals to provide elective, non-therapeutic abortions.[60] *Roe* merely extended the "right" of personal privacy—the constitutional protections or immunities from state interference in private matters—to include the abortion

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56. HOHFELD, *supra* note 35, at 60.

57. *See* 410 U.S. at 154.

> [I]t is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.

Id. (citations omitted).

58. Maher v. Roe, 432 U.S. 464, 465-66 (1977) (state not constitutionally required to fund non-therapeutic abortions); Harris v. McRae, 448 U.S. 297, 311 (1980) (state not required to fund medically necessary abortion); Williams v. Zbaraz, 448 U.S. 358, 369 (1980) (state could not be required to pay monies to secure abortions for those too poor to afford them privately); Beal v. Doe, 432 U.S. 438, 445-46 (1977) (Roe v. Wade acknowledged an important and valid state interest in encouraging childbirth which cannot be undercut by requiring states to fund non-therapeutic abortions).

59. 448 U.S. at 316; 432 U.S. at 481 (Burger, C.J., concurring) ("The Court's holdings in *Roe v. Wade* . . . and *Doe v. Bolton* . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion. These precedents do not suggest that the State is constitutionally required to assist her in procuring it.").

60. *See* Doe v. Bolton, 410 U.S. 179, 197-98 (1973) (notes with approval state statute under which "the hospital is free not to admit a patient for an abortion. . . . Further, a physician or other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure."); Poelker v. Doe, 432 U.S. 519, 521 (1977) (public hospitals are not required to provide non-therapeutic abortions); Doe v. Bellin Memorial Hosp., 479 F.2d 756, 757 (7th Cir. 1973) (fourteenth amendment protects right of privacy from state deprivation but does not require private hospitals to open facilities for abortions).

decision within the parameters defined by the trimester formula.[61]

Roe v. Wade may have also conferred a "right" in the sense of a privilege, that is, a negation of a legal duty, if it is accepted that, before the decision, a pregnant woman was under a legal duty, imposed by the anti-abortion statutes, to give live birth. Accordingly, the granting of this privilege from prosecution created a correlative "no-right" on the part of the state to enforce its anti-abortion law, at least to the extent of the trimester analysis of *Roe*.

The factual requirements which trigger the constitutional protections recognized in *Roe* demonstrate that the "immunity" involved falls short of creating an affirmative claim against private individuals who may affect the abortion choice. The *Roe* protections apply to *state* interference with the abortion decision. As the Supreme Court explained in *Maher v. Roe*,[62] *Roe v. Wade* recognized only a "constitutionally protected interest 'in making certain kinds of important decisions free from *governmental compulsions*.' "[63] Even given state action, there is a constitutional violation only when the state affirmatively places "obstacles" in the way of a "pregnant woman's path to an abortion [which were] not already there."[64] *Roe* does not compel a state to remove obstacles to the abortion choice which are not created by the state.[65] The Court also held in *Maher* that states are free to make value judgments preferring live births over abortions and to advance those policies through spending programs.[66]

By this analysis, state courts are free to reject wrongful birth claims without running afoul of the *Roe v. Wade* constitutional guarantees. Thus, by rejecting wrongful birth claims, (1) there is no state action which (2) affirmatively creates an obstacle to abortion that did not already exist, and (3) the state may be freely exercising a value judgment that live births are preferred.

The Supreme Court of Minnesota has applied this analysis to hold that *Roe v. Wade* does not constitutionally require recogni-

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61. Roe v. Wade, 410 U.S. 113, 152-59 (1973).

62. 432 U.S. 464 (1977).

63. *Id.* at 473 (emphasis added) (citing Whalen v. Roe, 429 U.S. 589, 599-600 and nn.24 & 26 (1977)).

64. *Id.* at 474.

65. Harris v. McRae, 448 U.S. 297, 316 (1980). In *Harris*, the Hyde Amendment's restriction on the use of federal funds for "medically necessary abortions" was challenged. Explaining *Maher* and reiterating its holding, the Court noted that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, *it need not remove those not of its own creation.*" *Id.* at 316 (emphasis added).

66. 432 U.S. at 474.

tion of wrongful birth claims. In *Hickman v. Group Health Plan*,[67] the Minnesota court determined the constitutionality of a state statute which prohibited wrongful birth actions. The plaintiffs, initially bringing a wrongful birth action, alleged the statutory bar to their claim was unconstitutional under *Roe v. Wade*. First, the Minnesota court noted:

> Prerequisite to a possible violation of the Fourteenth Amendment is state action or involvement. How can it be argued that state action is involved in this case? The relationship here is strictly between doctor and patient. . . . It does not directly touch on the expectant mother's right to choose an abortion. Due process does not require that the state adopt regulations prohibiting purely private conduct.[68]

This reasoning was clarified in a concurring opinion: "[I]f the doctor's inadvertence or carelessness places an obstacle in the path of plaintiff's abortion decisionmaking, it is placed there by the doctor, not the state. The doctor, not the state, is precluding the patient from making an informed abortion decision."[69]

Second, the Minnesota Supreme Court held that, even were there sufficient state action, "in order to be in violation of *Roe v. Wade*, the state must directly affect or impose a significant burden on a woman's right to an abortion."[70] The statutory refusal to recognize wrongful birth suits did not "directly interfere with the woman's right to choose a safe abortion. The two parties, doctor and patient, are still left free to make whatever decision they feel is appropriate."[71]

Therefore, after critical legal analysis of the *Roe v. Wade* decision, it can be seen that the Minnesota decision is in step with the rights recognized in *Roe*. *Roe v. Wade* did not create a right to recover in wrongful birth and wrongful life causes of action. The state legislatures and courts, therefore, are free to refuse recognition of such claims.

Courts that have recognized wrongful birth/life actions have typically cited *Roe v. Wade* as the basis for this right of recovery. However, a Hohfeldian analysis demonstrates that the two "rights" involved are distinctly different types of legal relationships, such that the policy justifications and interest balancing of *Roe* do not compel the leap to the right to recover for wrongful birth. More-

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67. 396 N.W.2d 10 (Minn. 1986) (citing Shelly v. Kraemer, 334 U.S. 6 (1948)).
68. *Id.* at 13 (citing Blum v. Yaretsky, 457 U.S. 991 (1982)).
69. *Id.* at 17 (Simonett, J., concurring specially).
70. *Id.* at 13.
71. *Id.* at 14.

over, the holding of *Roe* is sharply limited by its context—a consideration of a state criminal statute.

B. *Roe v. Wade is Based upon an Interests Analysis Quite Distinct from the Interests to be Weighed in Wrongful Birth/Life Actions*

In order to facilitate a jurisprudential analysis of the interests weighed in *Roe v. Wade*, as opposed to the interests to be weighed in wrongful birth/life causes of action, a consideration of the basic principles of the utilitarian theory of justice will be helpful. The utilitarian theory of justice, as commonly understood, seeks the greatest good for the greatest number.[72] This basic formula oversimplifies the various nuances of philosophical thought encompassed within the "utilitarian" rubric. For example, where utilitarianism is a metaethical view that determines the meanings of moral words such as "right" or "wrong," then utilitarianism may be a type of Ethical Naturalism. Utility is a means for describing an act's essential rightness ("right" = utility maximizing). On the other hand, a normative view of utilitarianism is more common, in which utility does not fix or define rightness, but which instead tells us what we ought to do. Whatever maximizes utility is always "right" to do.[73]

Normative utilitarianism judges the morality of an act by examining its consequences. In this sense, legal philosophers with widely divergent views regarding the meaning of moral words may all be utilitarian.[74]

However, at its roots, every form of utilitarianism involves a naturalist or deontologic judgment as to the intrinsic value that is described by "greatest good." "Good" may mean human "pleasure" for one utilitarian and "happiness" for another.[75] "[D]eliberations in normative ethics are to some extent dependent upon and cannot be completely detached from metaethical considerations."[76] If utilitarianism is anything more than a mere mathematical formula for quantifying competing results in a moral vacuum, the utilitarian

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72. Fletcher, *Ethics and Health Care Delivery: Computers and Distributive Justice*, in ETHICS AND HEALTH POL'Y 107, 108 (R. Veatch & A. Branson eds. 1976).

73. Hare, *Ethics: Utilitarianism*, in 1 ENCYCLOPEDIA OF BIOETHICS 424-28 (W. Reich ed. 1978).

74. *Id.*

75. T. MAPPES & J. ZEMBATY, BIOMEDICAL ETHICS 7 (2d ed. 1986) [hereinafter T. MAPPES AND J. ZEMBATY].

76. *Id.* at 2.

theory must either assume or supply natural moral values by which those results can ultimately be evaluated—to determine whether the resulting norms create more "good" or less "good." Thus, the utilitarian formula determines greatest good as a function of two factors — the empirical number of people involved and the ethical value assigned to the effect upon those people. Even a pure cost-benefit analysis assumes a value standard that defines a benefit (good) as distinct from a cost (bad).

The form of utilitarianism known as "rule-utilitarianism" appears to somewhat acknowledge that principles beneath the surface of normative quantification ultimately figure into the formula of what is the greatest good. Rule-utilitarianism is the judging of what is a right policy or act on the basis of a set of principles that promote the greatest general good.[77] This is a second-order type of inquiry, in which individual acts are not judged according to their utility (act-utilitarianism),[78] but which acts are judged according to a set of principles, which, if generally followed, would manifest the greatest good.[79]

Utilitarianism may now be seen in a more complicated light: a formula by which alternate consequences may be compared, not simply in terms of numerical impact (greatest number), but also by assigning a basic value to those impacts, whether derived from implicit moral notions of good or from generally accepted principles which are deemed to most often promote that implicit good. Given this characterization of utilitarianism, the standard constitutional balancing test of competing "rights" can now be analyzed as essentially utilitarian in nature.[80]

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77. Branson, *Health Care: Theories of Justice and Health Care*, in 2 ENCYCLOPEDIA OF BIOETHICS 631 (W. Reich ed. 1978).

78. T. MAPPES & J. ZEMBATY, *supra* note 75.

79. T. BEAUCHAMP & J. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 5 (1979).

80. For example, a court faced with balancing the defamation claim of a plaintiff against the first amendment claims of a defendant might decide that the first amendment interest, if protected, would provide the greatest good for the most people, based on either (1) the general principle that the free flow of information and the "free marketplace of ideas" most often lead to the greatest political discourse and governmental responsibility (or perhaps greatest economic efficiency, or even basic "liberty"), or (2) the intrinsic worth of freedom or free speech which itself represents the "good" to be coupled with the numerical measure of those affected. Conversely, the court might decide that the first amendment interest would produce less good—either (1) because it involved less people, or (2) the resulting good was qualitatively less as compared to the good derived from deterring and remedying defamation by allowing the claim, or (3) the good was lesser as a function of both numbers and the type of good produced. Again, the "good" could be derived from either a general principle—that protecting one's good name, community standing, or business reputation ultimately produces the greatest "good" (whether seen in ultimate terms of happi-

The holding of *Roe v. Wade* is derived from, and limited by, the balancing test of competing rights typical of constitutional theory: "We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[81]

From this language, it is clear that the Court considered the interests of two parties: pregnant women and the state. The opinion also suggests the Court acknowledged other interests that might be involved in the abortion decision: the interest of fetuses ("the developing young in the human uterus" as the Court says at one point)[82] and the interest of physicians involved in abortion decisions.[83]

A state court evaluating a wrongful birth cause of action is of course bound by *stare decisis* and the holding of *Roe v. Wade*. But the precedential effect of the *Roe* decision may be illusory when the "right" to recover for wrongful birth is seen as a right of an entirely different nature than the privacy right in *Roe*. This premise is possible when the "right" to sue for wrongful birth is understood to be the product of a significantly different balancing process involving different parties and different consequences than those in the Supreme Court's evaluation of the abortion choice. Of course, a state court cannot relitigate *Roe v. Wade*, and might at first blush feel constrained to adopt the relative weights assigned to the competing interests by the Supreme Court in *Roe*. However, this view of *Roe v. Wade* as binding on an evaluation of a wrongful birth claim is avoidable by recognizing that the competing interests in *Roe* were identified and weighed strictly within the confines of the operative facts of *Roe* and the context of the policy choices at issue in that decision. In any event, a utilitarian analysis on a theoretical level is not bound by rules of *res judicata* or *stare decisis*. An evaluation of fetal rights implicated in a wrongful birth/life action readily demonstrates these distinctions.

1. The Rights of "The Developing Young"

The *Roe* Court acknowledged an argument "on the theory that a

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ness, pleasure, liberty, or whatever value "good" represents)—or the "good" could simply be the value intrinsically represented by personal dignity and reputation.

81. Roe v. Wade, 410 U.S. 113, 154 (1973).

82. *Id.* at 159.

83. *Id.* at 163.

new human life is present from the moment of conception,"[84] but rejected the idea that such a human life should be accorded status as an independent factor in the balancing test. Instead, the Court accorded only secondary status to any new humans developing in the womb as being "*potential* life" subsumed under the state interest.[85] The Court appeared unwilling to decide whether a fetus represented more than "potential" life: "We need not resolve the difficult question of when life begins."[86] But, in refusing to decide, a decision was made—the life represented by the unborn was not an independent interest to be considered in the *Roe* balancing.

This conclusion by the Court is clear from its analysis of the fourteenth amendment. The Court acknowledged an argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment . . . If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[87] However, the Court concluded that "the word 'person', as used in the Fourteenth Amendment, does not include the unborn."[88] Such unborn children have no independent "right to life" to be weighed in the *Roe* interest-balancing test.

The *Roe* Court considered fetal rights not as an independent factor to be balanced, but only to the extent that such rights are reflected in the *state* interest in "potential life." A state court, however, might assign a utilitarian value to fetal rights *per se*, reasoning that the Supreme Court consideration of fetal rights was not binding because: (1) that Court did not decide the question of when life begins, and hence a state court would be free to assign value to the actual life represented by a fetus as well as the "potential life;" (2) the fetal interest in *Roe* was balanced only against the pregnant woman's privacy interest, and the balancing in the wrongful birth action is of a different order, involving not only the abortion decision, but the effect of the *cause of action* itself on fetuses (i.e., *Roe* is limited on its facts and issues); or (3) the fourteenth amendment analysis that the term "person" does not include the unborn, is, again, limited to constitutional issues and balancing, and does not reach to the balancing of the competing policy ramifications of creating a new type of tort claim.

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84. *Id.* at 150.
85. *Id.* (emphasis in original).
86. *Id.* at 159.
87. *Id.* at 156-57.
88. *Id.* at 158.

The *Roe* view of fetal rights, when fitted into the utilitarian model, suggests that the numerical value ("greatest number") are those citizens represented by the state, and the intrinsic value ("greatest *good*") is the value of life watered down to a "potential" level. In contrast, a state court affording fetal life independent worth would add to the balance not only the number of citizens as represented by the state, interested in "potential life," but also a stronger interest—the number of all fetuses to be affected by the policy choices, and the value of their lives as actual life, like that of their mothers', or of any human life.

An example of a court finding the *Roe* valuation of fetal rights as non-binding is found in *Transamerica Insurance Company v. Bellefonte Insurance Company.*[89] The United States district court in *Transamerica* considered the issue of whether a child, in the fetal state, is a "person" capable, under the law, of sustaining bodily injury. The plaintiff insurance company, in a declaratory judgment action, argued that *Roe v. Wade* implied that a fetus is not considered a legal person, and thus, no bodily injury to a "person" could occur to a fetus under an insurance policy provision for bodily injury to a person.

The court held otherwise, concluding that fetuses are persons capable of sustaining bodily injury. "The decision in *Roe* addressed the respective interests of the state and mother and focused on the woman's right of personal privacy in the context of a Texas criminal abortion statute. Whether an unborn person is a 'legal' person was not a question decided by the Supreme Court."[90] The court relied on several cases that found a fetus has a separate existence from the moment of creation.[91] The court also cited cases from two states that rejected another concept mentioned in *Roe* as a limitation on fetal value—viability. In *Kelly v. Gregory*,[92] a New York court held that the legal existence of the child begins at conception. Although the child under consideration was injured in the third month of pregnancy and could not have survived outside of the womb, the court distinguished the notion of physical viability from the legal principle of separateness to sustain fetal injury.[93] In *Smith v. Brennan*,[94] the New Jersey Supreme Court likewise re-

89. 490 F. Supp. 935 (E.D. Pa. 1980).
90. *Id.* at 937.
91. *Id.*
92. 282 A.D. 542, 125 N.Y.S.2d 696 (N.Y. App. Div. 1953).
93. *Id.*
94. 31 N.J. 353, 157 A.2d 497 (1960).

jected the argument that a fetus must be viable before considered capable of separately sustaining injury, based on the finding that a child is in existence from the moment of conception and is not merely considered a part of the mother's body.[95]

The *Transamerica* decision, and the cases cited therein, suggest that there is a legal basis for attaching independent significance to the value of fetal life in both a practical rights-balancing determination or a theoretical evaluation of competing policies. A survey of the field of fetal rights provides abundant examples from the areas of tort, property, and criminal law which support this conclusion that the unborn child is an independent person with rights worthy of protection. This body of law suggests that the Supreme Court's decision not to afford independent value to the "developing young" in a constitutional rights-balancing context is neither an all-encompassing evaluation nor an absolute ascertainment of fetal value.

William Prosser, surveying the state of tort law, summarized the evolution in the legal status of the unborn child:

> Prior to 1946, when a pregnant woman was injured, and her child as a result was subsequently born in an injured or deformed condition, nearly all of the decisions denied recovery to the child. . . .
>
> (M)edical authority has long recognized that an unborn child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. It has been accorded legal status for various purposes in equity, criminal law, property law, and tort law . . . All writers who have discussed the problem have joined in condemning the total no-duty rule and agree that the unborn child in the path of an automobile is as much a person in the street as the mother, and should be equally protected under the law.
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> Beginning . . . in 1946, a rapid series of cases, many of them expressly overruling prior holdings, brought about a rather spectacular reversal of the no-duty rule. The child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries, and if he dies of such injuries after birth an action will lie for his wrongful death.[96]

As Prosser notes, the child must be born alive to recover from prenatal injuries. But the "born alive rule" does not detract from the value of the unborn child, its personhood, rights, or protection to be afforded those rights (and consequent duties). Instead, the "born alive rule" is a rule of medical jurisprudence produced by

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95. *Id.*

96. W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 367, 368 (5th ed. 1984) [hereinafter PROSSER & KEETON].

the limitations on medical knowledge available to the common law in the 16th and 17th centuries. Given the primitive knowledge of life in the womb, live birth was an *evidentiary standard* required to prove that the unborn child was alive and that the tortious acts ultimately caused death or injury. Otherwise, it could not be established that the child was alive *in utero* at the time of the defendant's acts. Even after quickening, it was extremely difficult to determine whether the child died before or during labor.[97] The born alive rule persists despite today's medical technology because of the fear of some courts of legislating a "new crime" without legislative approval.[98] It is a misconception of the rule to see it as a threshold which fetal life must cross before it obtains independent value worthy of legal protection.

Similarly, as to viability, Prosser notes that:

> Viability . . . does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters. . . . Certainly the infant may be no less injured; and logic is in favor of ignoring the stage at which the injury occurs. With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement[s] altogether.[99]

Other commentators have also attacked viability as an illogical and meaningless factor in determining prenatal tort liability.[100]

As of 1987, twenty-two states still held to the born alive rule by court decision.[101] Courts in three states have abandoned the rule, while others have abandoned the rule to some extent by statute.[102] Prosser and other authorities have noted that all jurisdictions allow actions for prenatal injury for a child later born alive, and if the child dies of such injuries after birth, an action for wrongful death is recognized.[103] At least seventeen states have considered and allowed recovery although such injuries were sustained at a previable stage.[104]

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97. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U.L. REV. 563, 575-76 (1987) [hereinafter Forsythe].

98. *Id.* at 598.

99. W. PROSSER & W. KEETON, *supra* note 96, at 369.

100. Forsythe, *supra* note 97, at 626.

101. *Id.* at 595-96.

102. *Id.* at 596.

103. W. PROSSER & W. KEETON, *supra* note 96, at 368.

104. Collins, *supra* note 30, at 680-81.

Unborn children have been afforded the right to informed consent to medical treatment by several courts, and, as noted in *Transamerica, several courts have explicitly recognized that a child en ventre sa mere* (the equivalent, in law, of *in utero* in medicine) is a separate person from its conception.[105] In criminal law, several states recognize an unborn child as a person in the context of homicide or manslaughter statutes,[106] and at least three states have enacted statutes recognizing "feticide" as a separate indictable offense.[107] These statutes have subsequently been upheld against claims of unconstitutionality.[108] At least three state courts have held an unborn child to be within the contemplation of homicide or vehicular homicide statutes.[109] Some states have child abuse laws that extend protection to unborn children and establish a duty to provide their necessities.[110] A few states have intervened to require medical treatment *in utero* for an unborn child, implicitly recognizing that they represent lives worthy of protection.[111]

The common law has accorded unborn children property rights for nearly 300 years. For purposes of inheritance, such children are considered persons "in being."[112] Courts have consistently held that the unborn are entitled to the appointment of guardians in order to protect the child's interest in the property that represents proceeds or the corpus of a trust.[113] This suggests a property right and a fourteenth amendment due process concern. As with tort causes of action, the unborn child's property rights are conditioned on live birth merely because the benefits of those rights cannot be enjoyed until birth. Rather than a substantive value judgment, live birth is merely a procedural requirement, similar to venue or standing, which must be met to enforce the intrinsic right.[114]

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105. Transamerica Ins. Co. v. Bellefonte Ins. Co., 490 F. Supp. 935, 937 (E.D. Pa. 1980).

106. Forsythe, *supra* note 97, at 596 n.161.

107. *Id.* at 596 n.163.

108. *Id.*

109. *Id.* at 596 n.162.

110. *See, e.g.*, CAL. PENAL CODE § 270 (West Supp. 1988); Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806 (1940); Metzger v. Poople, 98 Colo. 133, 53 P.2d 1189 (1936).

111. *See* Lenow, *The Fetus as a Patient; Emerging Rights as a Person?*, 9 AM. J.L. MED. 1, 20-22 (1983-84); Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192 (1987).

112. 23 AM. JUR. 2d, *Descent and Distribution* 94 (1983).

113. Mabry v. Scott, 51 Cal. App. 2d 245, 124 P.2d 659, *cert. denied*, 317 U.S. 670 (1942); Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966).

114. *See* Endo Laboratories, Inc. v. Hartford Ins. Group, 747 F.2d 1264, 1267 (9th Cir. 1984); Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806 (1940); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939).

All of this provides a court wishing to weigh competing interests a substantial legal basis from which to accord the unborn independent significance. Moreover, recognition in tort law particularly, and criminal law to some extent, that the unborn are "persons" worthy of legal protection, provides additional foundation for deeming the life *in utero* as inherently valuable, and not merely a secondary concern of the state as "potential life."

The unborn child has been afforded rights sufficient for legal protection in other areas of the law. A fetus has been held to be a person under the Civil Rights Act of 1871.[115] Unborn children, though previable, have been found to be persons within the meaning of insurance policies.[116] In the wrongful birth area itself, courts have recognized fetal rights.

In *Gleitman v. Cosgrove*,[117] the first case to consider a wrongful birth action, the court rejected the claim based on a fundamental "sanctity of life" ethical position. The decision by the Supreme Court of New Jersey was pre-*Roe*, and expressly held that the right of the child to live outweighs the parental right to abort:

> It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort. . . . *[T]he right of their child to live is greater than and precludes their right not to endure emotional and financial injury.*[118]

In reaching this conclusion, the court clearly set forth its value judgment as to the intrinsic "good" that should be assigned life: "It is basic to the human condition to seek life and hold on to it however heavily burdened. . . . The right to life is inalienable in our society. . . . The sanctity of the single human life is the decisive factor in this suit in tort."[119]

A post-*Roe* court refused to recognize a wrongful birth claim in *Azzolino v. Dingfelder*.[120] The Supreme Court of North Carolina based its decision primarily on the impossibility of determining damages, but underlying this position of the court appears to be a

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115. 42 U.S.C. § 1983 (1982); Douglas v. Town of Hartford, 542 F. Supp. 1267 (D. Conn. 1982).

116. Transamerica Ins. Co. v. Bellefonte Ins. Co., 490 F. Supp. 935 (E.D. Pa. 1980); Endo Laboratories, Inc. v. Hartford Ins. Group, 747 F.2d 1264 (9th Cir. 1984).

117. 49 N.J. 22, 227 A.2d 689 (1967).

118. *Id.* at 30-31, 227 A.2d at 693 (emphasis added).

119. *Id.* at 30, 227 A.2d at 693.

120. 315 N.C. 103, 337 S.E.2d 528 (1985).

recognition of the intrinsic value of life.

> [We] conclude that life, even life with severe defects, cannot be an injury in the legal sense. . . . 'It is one thing to compensate destruction; it is quite another to compensate creation. This so-called "wrong" is unique: It is a new and on-going condition. As life, it necessarily interacts with other lives.'[121]

Perhaps the most illogical of all acknowledgments of fetal rights are those appearing in opinions upholding wrongful life tort claims. In *Harbeson v. Parke-Davis, Incorporated*,[122] the Supreme Court of Washington recognized both a wrongful birth action on behalf of the parents and a wrongful life action on behalf of the child. The wrongful birth action was predicated upon the parents' right to prevent the child's birth by abortion.[123] Curiously, the court then predicated the wrongful life action on the basis of the fetus being a legal person.

> Prenatal injuries to a fetus have been recognized as actionable in this state for 20 years. . . . We now hold that a duty may extend to persons not yet conceived at the time of a negligent act or omission.[124] . . . Such future children were . . . reasonably endangered by defendants' failure to take reasonable steps to determine the danger of prescribing Dilantin for their mother.[125] We have held that the physicians' duty to inform the parents of the risks associated with Dilantin extends to the *unconceived children*.[126]

The ethical problem posed by this language is obvious. On the one hand, the court allows the parents a "right to choose" abortion,[127] citing *Roe v. Wade* which considered the fetus as only "potential life" and not a person within the protection of the fourteenth amendment. On the other hand, the court deems the fetus a legal person to which a doctor owes a duty. This is logically contradictory. If the fetus is a person, to which a physician owes a duty to avoid negligent injury, then the physician would also owe a duty to that person not to inflict intentional harm, such as through abortion. The only logically consistent theory by which abortion would not be the killing of the person *in utero* would be through the adoption of a second-class type of personhood, where that life may be extinguished by the choice and permission of the parent,

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121. *Id.* at 109, 112-13, 337 S.E.2d at 532.
122. 88 Wash. 2d 460, 656 P.2d 483 (1983).
123. *Id.* at 472-73, 656 P.2d at 491.
124. *Id.* at 480, 656 P.2d at 495.
125. *Id.* at 480, 656 P.2d at 496.
126. *Id.* at 483, 656 P.2d at 497 (emphasis added).
127. *Id.* at 472, 656 P.2d at 491.

but otherwise, is protected from negligent doctors and other potential tortfeasors by a duty to avoid prenatal injuries.

The logic of the *Harbeson* court also calls for a conclusion that the penumbral privacy right which permits abortion is exalted above the very right to life of the *person* not yet out of the womb. Other courts that would recognize wrongful life claims rely on similar inconsistencies that accord the fetus value in order to create a duty by the defendant, while still allowing disposability of the fetus by the parents. A New York court saw this status as "the fundamental *right* of a child *to be born* as a whole, functional human being."[128]

The wrongful birth action requires an interest analysis of the rights of the unborn distinct from *Roe* for two reasons. First, state courts and legislatures are free, outside of the abortion context, to recognize the intrinsic value of a fetus, as demonstrated in tort, property, and criminal law. Second, the wrongful birth cause of action has unique implications for those in the category of the unborn. *Roe* considered only the interests implicated by the abortion choice. However, recognition of a wrongful birth/life action implicates the interests of unborn children who would not have been aborted given a free parental choice, but are aborted due solely to the effects of the wrongful birth action on parental choice, discussed below.[129]

2. *The Rights of Pregnant Women*

In *Roe*, the Court expressly considered the rights of pregnant women in its interest balancing analysis. In utilitarian terms, the numerical factor in evaluating this interest would be all pregnant women. The latent value judgment—the "good" to be measured to determine the greatest good among policy alternatives—might be seen as a "good" derived from an act-utilitarianism or from a rule-utilitarianism. As the former, the good protected by the policy or act being evaluated is intrinsic, and might be represented as "privacy." Some language of the Court supports this approach: "[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'. . . are included in this guarantee of personal privacy."[130]

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128. Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110, 114 (1977), *modified sub. nom.*, Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

129. *See infra* text accompanying notes 133-71.

130. Roe v. Wade, 410 U.S. 113, 152 (1973).

As rule-utilitarianism, the "good" created by the policy is manifested through the general principle of privacy, which is a second-level value that represents basic "good" manifested by several various acts. The Court speaks of "a distressful life" (unhappiness?), created by the pressures of maternity or additional offspring, and forced on pregnant women by the denial of the abortion choice. "Psychological harm may be imminent. Mental and physical health may be taxed by child care. There . . . [may be] distress, for all concerned, associated with the unwanted child, and . . . the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."[131]

Roe and its progeny unmistakably identify the primary interest of the pregnant woman, to be protected from state intrusion, as the free choice "whether or not to terminate her pregnancy"[132]—a choice encompassed by the protections of the right of privacy. State recognition of the wrongful birth cause of action, however, interferes with this choice in several ways.

First, the wrongful birth cause of action imposes liability on physicians not previously existing at common law[133] nor created by *Roe v. Wade*. This, in turn, creates a financial incentive for physicians to recommend amniocentesis and genetic screening in borderline cases, and in possibly most or all cases for the particularly "cautious" physician.[134] The incentive is simply to avoid liability and, where there may be no liability, to avoid the costs of frivolous litigation. For example, when New York recognized the wrongful birth action, a prediction was made that legal implications would lead to the use of amniocentesis in all pregnancies.[135] A year later, doctors were reporting use of amniocentesis on women below the age of thirty-five even though amniocentesis was not medically indicated. Fear of legal liability was a major factor cited for promoting the procedure.[136]

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131. *Id.* at 153.

132. *Id.*

133. Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 571.

134. *Id.* at 572.

135. *Id.* (citing *Doctors Held Liable in Abnormal Births*, N.Y. Times, Dec. 28, 1978, at B6, col. 4).

136. Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 572 (citing Powledge, *Prenatal Diagnosis: New Techniques, New Questions*, HASTINGS CENTER REP., June 1979, at 16)("Some physicians report that they use amniocentesis on women below 35 years of age even though such women are not subject to an elevated risk of bearing a child with a chromosomal anomaly. A major factor in promoting such practices, they acknowledge, is fear of liability.").

The financial incentive is not only to recommend prenatal screening, but also to recommend abortion where diagnostic results are borderline, or where the physician is "cautious."[137] Similarly, the financial incentive would lead to recommendations to abort where genetic screening has not been performed, and possibly not even medically indicated, when the physician becomes concerned that his failure to conduct such testing or recommend such procedures could expose him to eventual liability.[138]

The tendency of physicians to employ defensive medicine in the face of increasing tort liability is historically demonstrated[139] and is, in fact, the very basis for recognizing the wrongful birth claim.[140] Numerous commentators have predicted defensive overreaction resulting from increased recognition of wrongful birth actions.[141] The practice appears to have already occurred in the field of genetic screening. Maternal serum alpha-fetoprotein (AFP) screening is a form of screening for fetal defects that employs such diagnostic techniques as blood samples from pregnant women, amniocentesis (to analyze the amniotic fluid), genetic counseling and possibly ultrasound. Where these services are not available, along with a high-quality laboratory, routine AFP screening does more harm than good, increasing cost and parental anxiety and *causing unnecessary abortions.*[142] The American College of Obstetricians and Gynecologists (ACOG) has informed its members that, although such tests are useful where patients have had a previously affected child, routine AFP screening is "of uncertain

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137. Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92, 155 (1974) [hereinafter Friedman].

138. Azzolino v. Dingfelder, 315 N.C. 103, 113, 337 S.E.2d 528, 535 (1985).

139. Capron, *supra* note 26, at 667 (citing Altman, *Pole Indicates 3 in 4 Doctors Order Extra Tests to Protect Against Suits*, New York, Mar. 28, 1977, at 19).

140. Courts that recognize wrongful birth claims often reason that imposition of liability on physicians is necessary to create "a strong incentive to prevent the occurrence of the harm." Speck v. Finegold, 497 Pa. 77, 85, 439 A.2d 110, 114-15 (1981). *See also* Smith v. Cote, 128 N.H. 231, 241, 513 A.2d 341, 347 (1986) (no wrongful birth liability would "dilute the standard of professional conduct"). Dissenting opinions in cases refusing to allow wrongful birth claims echo this theory. *See* Hickman v. Group Health Plan, 396 N.W.2d 10, 19 (Minn. 1986) (Amdahl, C.J., dissenting); *Azzolino*, 315 N.C. at 124, 337 S.E.2d at 542 (Martin, J., concurring in part and dissenting in part). This analysis proves too much. In order to remedy the rare instances where physicians provide negligent genetic counseling, "a strong incentive" is created, by threat of liability, which leads to a greater number of cases of literal overkill. *See* text accompanying notes 141-70.

141. Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 572; Friedman, *supra* note 137, at 155.

142. Annas, *Is a Genetic Screening Test Ready When the Lawyers Say It Is?*, HASTINGS CENTER REP., Dec. 1985, at 16 [hereinafter Annas].

value."[143] An ACOG bulletin concluded that when coordination of resources and services is not possible, the risks and costs appear to outweigh the advantages, and a routine screening program should not be implemented.[144]

However, despite this technical bulletin from the ACOG, the ACOG Department of Professional Liability issued its own bulletin that noted the "professional liability implications" of the increasing availability of AFP tests. The bulletin advises: "It is now imperative . . . that every prenatal patient be advised of the availabilty of this test. . . . The physician who has fully discussed AFP tests and follow-up testing with his or her patients . . . and who has documented it in the chart should be in the best possible defense position."[145]

One commentator noted that routine use of AFP screening would have counterproductive results for the health of women engaged in exercising their reproductive choice. "[U]nrestricted use of the AFP kits could increase the number of abortions of *normal* infants, minimize identification of affected infants, and heighten anxiety over the outcome of pregnancy."[146]

As *Roe v. Wade* noted, abortion carries with it a health risk to the pregnant woman.[147] Not only is this risk increased when abortions are increased through the imposition of wrongful birth liability, but reproductive choice is skewed when normal children are aborted that were desired and would have been chosen by the mothers but for the pressures from the physician to screen or abort.[148]

There is also an accuracy, or "predictability," problem with prenatal testing. First, there is the problem of counselor error.

> As is true for other kinds of diagnosis, the process of reproductive counseling is strewn with opportunities for missteps. . . . A genetic counselor will be expected to exercise reasonable care to supply an accurate diagnosis. . . . Nevertheless, a counselor is not required, any more than is any other medi-

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143. *Id.* at 16-17.

144. *Id.* at 17; *see also* Marmion, *The California Alpha-Fetoprotein Screening Program*, 54 LINACRE Q., Feb. 1987, at 77-78 [hereinafter Marmion].

145. Annas, *supra* note 142, at 17 (emphasis added).

146. Nolan-Haley, *Amniocentesis and Human Quality Control*, 8 HUM. LIFE REV. 51, 53 (Spring 1982) (emphasis added)(citing 45 Fed. Reg. 74, 159 (1980)) [hereinafter Nolan-Haley]; *see also* Marmion, *supra* note 144, at 79.

147. Roe v. Wade, 410 U.S. 113, 150 (1973).

148. *See, e.g.*, Martinez v. Long Island Jewish Hillside Medical Center, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987) (upheld mother's cause of action for psychological injury due to her submission to an unnecessary abortion after genetic counselors had erroneously advised her that her baby would be born with severe defects).

cal practitioner, to supply error-free explanations.[149]

Second, there is the problem of errors inherent in the testing technology. The only prenatal test ever considered as a possible candidate for recommended use for all pregnant women in the United States is the alpha-fetoprotein screening test (AFP). "Properly administered, this series of tests detects 80 to 90 percent of all anencephalies and 63 to 90 percent of all open spina bifidas. More recently it has been shown that such testing may also detect 20 to 40 percent of all Down syndrome fetuses."[150] However, the problem with the AFP screening program is the lack of reliability. "The test is falsely positive (that is, unaffected women will test as if their baby is affected) in 95 percent of the cases. . . . The test is falsely negative (that is, infants with NTD [neural tube defects] who test as normal) in 22 percent of the cases."[151] False positive test results increase the level of maternal anxiety and cause some women to secure abortions without further testing and confirmation of the test result.[152] This dramatically increases the probability that children without disabilities will be aborted due to parental fear of giving birth to a child with disabilities.

Moreover, amniocentesis is unable to differentiate between an affected fetus and a mere carrier for most genetic diseases, which means that many carriers would be aborted. This would, of course, "deny life to a large number of unaffected offspring,"[153] desired by their parents but aborted due to the effects on the abortion choice created by the pressures of wrongful birth tort liability.

Parental choice is skewed in another way by increased screening generated by wrongful birth liability. Even where the fetus is affected, in many cases it is impossible to predict with medical certainty whether the defect is extreme or minimal.[154] Retardation may be slight or severe. Persons with birth defects often lead meaningful, happy lives and make valuable contributions to others. But these relatively normal children, initally desired by parents, will often be aborted because of the doubts and supposed severity

149. Capron, *supra* note 26, at 626-27.

150. *See, e.g.*, Annas, *supra* note 142, at 16.

151. Marmion, *supra* note 144, at 79.

152. *Id. See also* Elias & Annas, *Routine Prenatal Genetic Screening*, 317 No. 22 NEW ENG. J. MED. 1407, 1408 (1987)("If these tests are to do more good than harm, their careful validation will be essential, coupled with education of both practicing physicians and patients concerning their use.").

153. Friedman, *supra* note 137, at 108.

154. Fletcher, *Prenatal Diagnosis: Ethical Issues*, in 3 ENCYCLOPEDIA OF BIOETHICS 1343 (R. Reich ed. 1978) [hereinafter Fletcher].

of defects suggested by screening.[155]

Testing technology also carries with it health risks. Experts have calculated that amniocentesis presents a risk of fetal or maternal injury of between one and two percent, such that at least a two percent risk that a fetus is defective must exist before amniocentesis is "warranted" even on a eugenic or wrongful birth basis.[156] However, where amniocentesis is not performed, the risk that a child will be born with a neural tube defect (anencephally, encephalocele and spina bifida) is 1.1,000, omphalocele (congenital hernia) is 1/6,000, and Down syndrome is 1/800.[157] The risks of maternal injuries from amniocentesis include placental hemorrhage, perforation of the intestines, uterine infection and death.[158] Risks to the fetus include congenital abnormality, pregnancy complications, spontaneous abortion, neo-natal death and stillbirth.[159] Thus, increased screening triggered by defensive medicine will sacrifice maternal health and healthy, "wanted" babies without any net benefit to maternal choice.

Proponents of widespread prenatal testing have suggested that the health hazards of amniocentesis and similar procedures are declining as technology improves, the use of specialists increases and expertise improves.[160] However, the increased use of sophisticated technology and specialists introduces another factor which interferes with reproductive choice. The increasing demand for screening procedures and the resultant increased costs may deprive lower income families of an effective choice for such procedures. There may be occasions when screening is medically indicated and would provide a proven health benefit to the management of the pregnancy, but such procedures would be foregone due to the lack of available resources or high costs generated by the increased use of screening due to tort liability. It was noted above that routine AFP testing, without adequate resources, would be counterproductive in this respect. The FDA has questioned whether a sufficient supply

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155. *Id.*

156. Friedman, *supra* note 137, at 105; Manganiello, Byrd, Tho & McDonough, *A Report of the Safety and Accuracy of Midtrimester Amniocentesis at the Medical College of Georgia: Eight and One Half Years' Experience*, 134 AM. J. OBSTETRICS & GYNECOLOGY 911, 914 (1979); Hanson, Tennant, Zorn & Samuels, *Analysis of 2136 Genetic Amniocentesis: Experience of a Single Physician*, 152 AM. J. OBSTETRICS & GYNECOLOGY 436, 439 (1985).

157. Marmion, *supra* note 144, at 77, 80.

158. *See supra* note 156.

159. *Id.*

160. Fineberg & Peters, *Amniocentesis in Medicine and Law*, TRIAL, Feb. 1984, at 54-56 [hereinafter Fineberg & Peters].

of amniocentesis services exists to bear a significant increase in the use of such procedures.[161] Other commentators note the "entreprenurial response" to increased demand could lower quality levels, leading to more errors and health hazards.[162]

> [O]ne of the biggest technical problems is the receiving and communicating of accurate test results. Current laboratory services are overburdened and it has been predicted that a major increase in demand may result in an unacceptable error rate. Also, because this is a potential $100 million industry, there is the additional concern that profit may take precedence over quality control.[163]

Apart from medical and technological ramifications, further interference with the parental right of reproductive choice is manifested by the social pressures spawned by the wrongful birth cause of action. What may begin as a right may become an obligation. Ethicist John Fletcher has noted:

> With the availability of the technology and know-how permitting prevention of many genetically based congenital abnormalities, there may be developing as a corollary a social attitude which demands such use. In general, if a congenital abnormality can be avoided, then it should be, and those individuals who do not partake of these advances will be socially ostracized.[164]

Social coercion may be subtle yet still affect parental choice. If prenatal screening becomes widely promoted, public pressure will create subtle coercion to test and abort, or "guilt for women who decline to have the test performed."[165] Parents who choose to give birth to an "abnormal" child may be deemed "irresponsible."[166] A California court of appeal put it this way:

> If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude [wrongful life] liability insofar as defendants other than the parents are concerned. Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their

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161. Nolan-Haley, *supra* note 146, at 54.
162. Fineberg & Peters, *supra* note 160, at 59.
163. Nolan-Haley, *supra* note 146, at 55.
164. *Id.* at 63.
165. *Id.*; *see also* Fineberg & Peters, *supra* note 160, at 59.
166. Koop, *The Slide to Auschwitz*, 8 HUM. LIFE REV. 19, 22 (Summer 1982) (quoting Dr. James Sorenson) [hereinafter Koop].

offspring.[167]

Where the wrongful birth cause of action employs an objective test to determine whether the mother of a defective child would have undergone the procedure, the implication broadcast to society by a decision allowing recovery is that a reasonable person would abort a fetus with similar defects.[168]

> If court decisions establish prenatal diagnosis of genetic disorders as a duty owed to all parents at risk of bearing a genetically impaired child, a long, albeit unconscious, step will have been taken in the direction of removing this application of technology from the realm of personal decision-making and transferring it into the class of judgments known as "medical indications." This subtle change in professional and public awareness will have far-reaching implications. Social pressures may well inhibit, rather than reinforce autonomous decision-making by parents who would choose to give birth to a child with substantial impairments.[169]

Several commentators have noted the probability that economic pressures would also come to bear on the reproductive choice, in the form of insurance policies.[170] Health insurance companies already bear a substantial portion of the cost of genetic disease. Those carriers that cover large numbers of employed persons and their families would have significant financial incentive, given the legal duties and social climate engendered by wrongful birth liability, to offer only plans that require, as a condition of coverage, that the insured and spouse undergo broad genetic screening. The mother would be required to undergo amniocentesis routinely. If test results showed the fetus to be affected, it will be aborted at company expense. If such a fetus is carried to term, the delivery and child-rearing expenses will not be covered by the policy.[171]

At the very least, the imposition of tort liability for wrongful birth/life would have profound effects on the right of reproductive choice, effects not contemplated by nor implicit in the balancing

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167. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 830, 165 Cal. Rptr. 477, 488 (1980).

168. *See, e.g.*, Azzolino v. Dingfelder, 315 N.C. 103, 123, 337 S.E.2d 528, 541 (1985) (Martin, J., concurring in part and dissenting in part) (applicable statute established objective standard to determine whether the patient would have undergone abortion, thus allowing recovery for wrongful birth would require jury finding that reasonable person would have aborted child under the circumstances).

169. Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 572-73.

170. Friedman, *supra* note 137, at 111 n.123; Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 573 (citing Thompson & Greenfield, *Rights and Responsibilities of the Insurer*, in GENETICS AND THE LAW 289 (A. Milunsky & G. Annas eds. 1976)).

171. *See* Singer, *Impact of the Law on Genetic Counseling*, 9 BIRTH DEFECTS 34, 38 (1973).

analysis of *Roe*. In fact, in the wrongful birth context, the privacy right of choice enunciated in *Roe* conflicts with the recognition of a right to recover for wrongful birth/life and its medical ramifications. Physicians are already reporting that some of their number are using amniocentesis on women below thirty-five years of age, out of fear of tort liability, even though such women are not subject to an elevated risk of bearing defective children.[172]

The effects attendant to increased routine screening (the health hazards, interference with parental choice, and abortion of healthy unborn children) all suggest that the recognition of wrongful birth/life actions has serious negative effects on both the rights of the parents and those of unborn children—negative effects which clearly differentiate an evaluation of wrongful birth/life claims from the balancing of privacy and state interest in *Roe*.

3. *The State Interests*

Following the utilitarian model, the raw numerical value to be attached to the state interest (as the "greatest number") is the number of all those represented by the state—the citizens. The good (as in "greatest good") again may be derived either from a general rule designed to lead most often to the greatest "utility" and implicit good, or from an implicit good *per se*, without the imposition of the intermediate principle. In dealing with the state interest, the Supreme Court in *Roe* comes close to recognizing an intrinsic value—*life*. The Court appears to acknowledge life as a basic value in two different aspects: the "potential" life[173] of the "developing young in the human uterus,"[174] and the life (and thus the health) of the mother.

As to "potential" life, the Court offers no deeper analysis than the fundamental position that "[i]n assessing the State's interest, recognition may be given to the . . . claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone."[175] As noted, the Court found it unnecessary to "resolve the difficult question of when life begins,"[176] although, logically, such a resolution seems necessitated by a balancing test that recognizes intrinsic value in potential life.

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172. Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 572.
173. Roe v. Wade, 410 U.S. 113, 150 (1973).
174. *Id.* at 159.
175. *Id.* at 150 (emphasis in original).
176. *Id.* at 159.

Surely, if potential life has value, actual life would then be even more valuable, and would seem, to be consistent, to weigh as heavily in the balance as the actual life of the mother. Thus, a determination is required of when actual, rather than potential, life begins in order to ensure a proper balance.

As to the life of the mother, and the corollary maternal health, the Court is emphatic that this is a value that must be given great weight when regulating the abortion choice. During the first trimester, the decision is left to the *medical* judgment of the pregnant woman's attending physician.[177] During the subsequent trimester, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."[178] In the final trimester, the state may regulate except where it interferes with the preservation of "the life or health of the mother."[179]

The *Roe* Court summarized the state interests, and underlying each is the intrinsic value of life. "[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[180] The Court then balanced these interests against the privacy right accorded the "potential" mother. "At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute."[181]

The wrongful birth evaluation implicates an additional state interest not found within *Roe*: the interests of all citizens with disabilities. As noted at the outset of this article, and as the foregoing discussion demonstrates, the wrongful birth claim involves a distinction between babies who are disabled and those who are normal. A premise of the wrongful birth action is that the child's very existence as disabled is a legally cognizable *wrong* causing "damages."[182] A second premise is that the child with disabilities should have been aborted.[183] The legal and social judgment is that the disabled child's life is not worth living and that non-existence is not

177. *Id.* at 163.
178. *Id.* at 164.
179. *Id.* at 163-164.
180. *Id.* at 154.
181. *Id.*
182. Horan & Valentine, *The Doctor's Dilemma: Euthanasia, Wrongful Life, and the Handicapped Newborn*, in INFANTICIDE AND THE HANDICAPPED NEWBORN 32, 39 (D. Horan & M. Delahoyde eds. 1982).
183. *Id.*

only preferable, but of measurably greater value than life with disabilities.[184] "The idea that a handicapped child would lead a life that should better never have been lived, or that the parents are 'damaged' by that child's presence in their family, bespeaks . . . a pervasive social prejudice against the handicapped. . . ."[185]

The logic of the wrongful birth claim implicitly sets forth a "rational basis" for distinguishing between infants who are healthy and those who are disabled, so that discrimination and fourteenth amendment equal protection arguments against the cause of action might seem precluded. But the stigmatization and high toll on the self-esteem of persons with disabilities cannot be denied where the courts and society are proclaiming that persons with disabilities are of less value than an aborted fetus. Moreover, if a state-created wrongful birth action is based on *irrational* prejudice against the disabled, such state action is subject to constitutional attack.[186] It is irrational to prefer abortion over life with a disability, and to find parents damaged by the life of a disabled child when it is recognized that these beliefs pre-judge the value of an individual life and invoke speculation and "judgments that are beyond the moral abilities of courts, legislatures, or society as a whole, to make."[187]

Constitutional questions aside, the recognition of the wrongful birth action contravenes public policies protective of persons with disabilities. States commonly have expressed public policies extending extra protection and assistance to persons with disabilities.[188] Some states require, by statute, health insurance policies and health maintenance plans to include, from the moment of birth, dependents with disabilities.[189] Many states have educational programs which attempt to instill an attitude that students with disabilities, often called "exceptional students," are of

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184. *Id.* at 48.

185. Valentine, *When the Law Calls Life Wrong*, 8 HUM. LIFE REV. 46, 52 (Summer 1982) [hereinafter Valentine].

186. City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432, 450 (1985) (struck down a restrictive zoning ordinance based on "an irrational prejudice against the mentally retarded").

187. Valentine, *supra* note 185, at 52-53.

188. *E.g.*, MINN. STAT. §§ 62A.042, 62A.14, and 62A.141 (West 1986) (Minnesota insurance law requiring health insurance policies and health maintenance plans which cover a subscriber's dependents to include from the moment of birth any dependent with disabilities. The coverage is required to continue beyond the usual limiting age of coverage if the handicapped dependent is unable to support himself. Coverage for medical care arising out of congenital abnormalities is specifically prescribed.).

189. *Id.*

value.[190]

Federal policy likewise encourages the care and education of persons with disabilities, for example, as expressed in the Education of the Handicapped Act[191] and a federal statute that provides grants to states that offer free public education to disabled children.[192] Also, the Child Abuse Amendment of 1984 provides that states receiving federal funds for child abuse agencies are required: 1) to regard withholding of medically indicated treatment from disabled infants with life-threatening conditions as a form of child neglect; and 2) to establish mechanisms through state agencies to protect infants with disabilities.[193]

Section 504 of the Rehabilitation Act of 1973 declares a federal policy which values and protects the handicapped: "No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."[194]

Federal courts have also followed a nondiscrimination policy toward children with disabilities. For example, the District Court for the District of Columbia has declared that mentally retarded children are entitled to a public education equal to that of other youths.[195]

Against this backdrop of policy protecting citizens with disabilities, recognition of the wrongful birth claim creates a jurisprudential contradiction: a legal system that at once encourages the destruction of "defective" lives before birth and seeks to protect those lives after birth.[196] In the courts, the life of a "defective" child might be regarded as a legal "wrong" causing compensable

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190. *E.g.*, MINN. STAT. §§ 120.17, 252A.01-.21 (West Supp. 1988); OKLA. STAT. ANN. tit. 70, § 13-101 (West Supp. 1988); CAL. ED. CODE6 § 56300-381 (West Supp. 1988).

191. Education of the Handicapped Act, 20 U.S.C.A. § 1400-85 (West Supp. 1988).

192. 20 U.S.C.A. § 2771-72 (West Supp. 1988).

193. 42 U.S.C.A. § 5101-03 (West Supp. 1988).

194. 29 U.S.C.A. § 794 (West Supp. 1988).

195. Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972). While parents in a wrongful birth context might claim they would have aborted their child, if provided prenatal screening, because they lacked resources and thus are economically damaged by birth of the child, the court in *Mills* noted that the school district could not justify its failure to provide handicapped with education on par with other students on the ground that the district lacked sufficient economic resources. *Id.* at 876. *See also* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

196. Rosenblum & Grant, *The Legal Response to Babies Doe: An Analytical Prognosis*, 1 ISSUES IN L. & MED. 391 (1986).

damages to its parents, yet in the schools that life is expected to be accorded value equal to nondisabled children.

In a broader sense, the wrongful birth action implicates the interests of living children, even those not disabled, by undermining the basic policy behind child abuse statutes. Potential mothers are counseled that certain unborn children should be terminated before birth, but after birth, those mothers are subject to criminal prosecution for acts essentially similar. The possibility of recovery encourages parents of a child with disabilities to accept and testify, in court, that the child's life is an expensive injury to them—a wrong and an injustice—while at home they are under a legal obligation to value that "life" and care for their child.

4. The Interests of Medicine and Society

The *Roe* Court paid deference to the ethical integrity of the medical profession in the abortion choice, but it is unclear how much weight the Court accorded the physician's privilege of following his own medical judgment. As noted, during the first trimester, the pregnant woman does not have an entirely free choice to abort. The actual choice is left to the medical judgment of her physician.[197] The Court claims this "vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention."[198] While this "right" may have been "vindicated," it was never balanced against competing interests. No value was assigned to "professional judgment." Without independent weight, the physician's "right" appears derivative, dependent on the privacy right in order to survive in the face of the state interest in regulating the abortion decision. Moreover, what the Court grants as a "right" on one hand becomes liability[199] on the other.

> Up to those points (where the state interests justify regulation), the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the *privilege* of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.[200]

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197. Roe v. Wade, 410 U.S. 113, 150 (1973).

198. *Id.* at 165-66.

199. HOHFELD, *supra* note 35, at 59 ("Perhaps the nearest synonym of 'liability' is 'subjection' or 'responsibility.' ").

200. 410 U.S. at 165-66 (emphasis added).

In summary, the Supreme Court's decision in *Roe* is grounded not upon the right of a woman to control her body, but on "the right of the physician to administer medical treatment according to his professional judgment."[201] Prior to the point when a state has a compelling interest in the pregnancy, the physician's medical judgment and its effectuation are to be "free of interference by the State."[202] After that point, an "appropriate medical judgment" regarding the health of the mother may still override state regulation.[203]

Throughout the *Roe* progeny, the Court has continued to defer to the physician's privilege to exercise his professional judgment. In *Doe v. Bolton* [204] and *Beal v. Doe*,[205] the Court noted that medical judgments relating to abortion should be exercised in light of factors relating to the health of the patient.[206] The physician is to be allowed "the room he needs to make his best medical judgment."[207] In *Planned Parenthood of Central Missouri v. Danforth*,[208] the Court defined a physician's duty of informed consent as "the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession."[209] The critical point of viability, at which time the state may deny the pregnant woman the right to abort, was not a determination to be made by courts or the legislature, but was to be left to the medical judgment of the doctor: "[W]e recognized in *Roe* that viability was a matter of medical judgment . . . and we preserved the flexibility of the term."[210]

In *Colautti v. Franklin*,[211] the Court reaffirmed the primary role of the medical professional in determining the point at which abortion may be prohibited. "[N]either the legislature nor the courts may proclaim one of the elements entering into the ascertainment

201. *Id.* at 165.
202. *Id.* at 163.
203. *Id.* at 165.
204. 410 U.S. 179 (1973), *reh'g denied*, 410 U.S. 959 (1973).
205. 432 U.S. 438 (1977), *reh'g denied*, 434 U.S. 880 (1977).
206. 410 U.S. at 192; 432 U.S. at 441 n.3.
207. 410 U.S. at 192; 432 U.S. at 441 n.3 (citing 410 U.S. at 192).
208. 428 U.S. 52 (1976).
209. *Id.* at 67 n.8.
210. *Id.* at 64.
211. 439 U.S. 379 (1979).

of viability. . . ."[212] Regarding diagnostic testing, such as amniocentesis, the Court has held that "[t]he mode and procedure of medical diagnostic procedures is not the business of judges."[213] Regarding requirements that physicians inform pregnant women of available techniques or conditions relating to the health of her fetus, in *Akron v. Akron Center for Reproductive Health*,[214] the Court struck down state created requirements that an "attending physician" inform his patient of complications that may result if she chose to abort the child. Requiring physicians to recite certain information was seen as an intrusion upon the discretion of the physician.[215]

Similarly, the imposition of wrongful birth liability upon physicians for failing to inform a prospective mother of complications that would result if she chose to give birth, or of available diagnostic procedures, creates an intrusion upon the professional judgment of medical personnel. As noted above,[216] medical judgments are distorted, and often placed aside, where tort liability or the fear of litigation create financial incentives to employ defensive medicine. Medical judgments are no longer exercised according to factors relating to the patient's health. Financial considerations will dictate application of defensive medical procedures.

> [T]he proliferation of successful wrongful birth actions will have the inescapable result of placing physicians under a legal duty to perform, or at least to recommend or to suggest, some type of prenatal defect diagnostic test during every pregnancy that comes under his care. *As the wrongful birth concept gains acceptance, no doctor who values his economic security will be able to afford not to prescribe such evaluations.*[217]

Aside from financial considerations, if the wrongful birth claim is brought under the doctrine of informed consent,[218] which requires the physician to tell the patient "what a reasonable patient would want to know under the circumstances,"[219] the physician is again

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212. *Id.* at 388-89.

213. Parham v. J.R., 442 U.S. 584, 607-08 (1979).

214. 462 U.S. 416 (1983).

215. *Id.* at 442.

216. *See* text accompanying notes 133-45.

217. Horan & Valentine, *supra* note 182, at 45.

218. *See, e.g.*, Azzolino v. Dingfelder, 315 N.C. 103, 123, 337 S.E.2d 508, 540 (1985) (Martin, J., concurring in part and dissenting in part); Hickman v. Group Health Plan, 396 N.W.2d 10, 12 (Minn. 1986).

219. *See* Canterbury v. Spence, 464 F.2d 772, 786 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972); Capron, *supra* note 25, at 629; Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 564-65.

required to act in a manner unrelated to the health of his patient.[220] "The result of imposing the lay informed consent standard in the field of prenatal diagnosis would be to coerce medical practitioners to participate in the parents' pursuit of the perfect child, by placing those practitioners who decline such a role at risk of incurring civil liability."[221]

"Wrong sex" abortions are the most obvious example of how physicians might be required to give information for non-therapeutic purposes. One study found that a majority (twenty-nine out of forty-six) of assumedly "reasonable" women who learned from amniocentesis that their children would be girls chose to abort.[222] Only one woman out of a group of fifty-three that learned their children would be boys chose to abort.[223] Examples of sexual preference abortions, which end the lives of healthy unborn children merely because they are of the "wrong" sex—almost always female, are widespread and increasing.[224] Such practices would become predominant with the proliferation of wrongful birth claims leading to routine prenatal testing. Requiring physicians to undertake such procedures would violate the medical and personal judgment of many.

Not only would physician judgment be hampered in individual cases, but wrongful birth liability and consequent screening requirements would interfere with the medical profession's duty of "determining the proper allocation of health care resources. . . ."[225] It would be the consumer/patients, those who ultimately bear the cost of increased malpractice liability, that would suffer from non-medical intrusions into physician decision-making.[226]

The privilege of the physician to exercise his medical judgment is not his only interest at stake. A physician may have rights of conscience that would be violated by requiring him to impart information or treatment which would facilitate an abortion decision or the practice of eugenic selection.[227] Objections on the basis of conscience might arise from medical considerations, such as a pro-

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220. Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 565.

221. *Id.* at 566.

222. *Id.* at 566 n.100 (citing C. RICE, BEYOND ABORTION 98 (1979)).

223. *Id.*

224. Nolan-Haley, *supra* note 146, at 56, 57.

225. Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 566.

226. *Id.*

227. Weber, *Are Wrongful Birth Suits Unconstitutional?*, in STATUS CALL, Fall 1985, at 1-2 [hereinafter Weber].

fessional evaluation of the health risks involved in the objectionable procedures, or an application of medical ethics.[228] A physician's objection may also arise from moral considerations such as the widespread pro-life philosophy or personal beliefs based on individual experiences with abortion of children.[229]

> The Akron decision represents the flip side of wrongful birth suits. Just as the state cannot require a physician to speak and give indirect support to the philosophy that human life in the womb deserves respect and protection, so the state cannot require an obstetrician to speak and give indirect support to the philosophy of eugenics and prenatal genetic selection.[230]

The rights of freedom from compulsory expression and freedom of thought, recognized by the Supreme Court in *Wooley v. Maynard*[231] and *West Virginia State Board of Education v. Barnette*,[232] may be violated by imposing on physicians liability for failing to facilitate abortions and eugenic selection.[233] The right of privacy, the determinant in *Roe*, may also be implicated. One observer has noted: "An individual's refusal, on moral grounds, to participate in performing an abortion is an exercise of conscience protected by the same right of privacy which now protects the woman's right to choose an abortion."[234] As noted, wrongful birth liability could eventually lead to a standard for every obstetrician-patient relationship that eugenic screening be discussed or employed. Such a procedure would not only be highly intrusive into the professional physician-client relationship, but would also intrude into the personal philosophies of many doctors *and* patients.[235]

"A physician cannot suggest eugenic screening and selection without by that very suggestion granting credibility and support for the eugenic philosophy."[236] Should the doctor recommend against a standard procedure, he may not only risk incurring liability, but by being forced to note his objection, or by being forced to recommend another physician who might meet the required standard without moral misgivings, the doctor is compelled to call at-

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228. *Id.* at 2.
229. *Id.*
230. *Id.* at 7.
231. 430 U.S. 705 (1977).
232. 319 U.S. 624 (1943).
233. Weber, *supra* note 227, at 1.
234. Horan & Valentine, *supra* note 182, at 46 (quoting Professor Lynn Wardle of Brigham Young University).
235. Weber, *supra* note 227, at 4.
236. *Id.*

tention to a practice which he believes should have no place in medicine.[237]

It solves little to allow the objecting obstetrician to refer his patient to a doctor who actively participates in genetic screening and abortion. The required recommendation is merely a forced participation, a burden on the first physician's right to object. Such a recommendation may be the moral equivalent of participating in or facilitating the actual abortion.[238] "Thus, it can be said logically that the creation of a legal duty for physicians to perform up to a given standard of care in the field of pre-natal genetic diagnosis could well lead to serious interference with a doctor's protected right to individual conscience."[239]

The pressure on the physician may be more direct, and may be of a type that cannot be avoided even by referring the patient to another doctor. As noted above,[240] pressure from insurance carriers might force expectant mothers to obtain genetic testing. The probability is even greater that medical malpractice insurers will require physicians to provide prenatal screening to avoid liability. Those that refuse would lose the insurance coverage necessary for them to practice their profession.[241]

Wrongful birth liability forces some obstetricians out of the profession simply by requiring them, directly or indirectly, to participate in abortion and eugenic practices.[242] Thus, state action recognizing wrongful birth claims may be subject to constitutional challenge. The Supreme Court held in *Sherbert v. Verner*[243] and *Thomas v. Review Board*,[244] that the state cannot force an individual "to choose between following the precepts of religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[245]

For all physicians, regardless of personal philosophy, the proliferation of prenatal screening will pressure medical judgment through the two-edged sword of the malpractice suit. A physician may be sued for failing to recommend amniocentesis and thus per-

237. *Id.* at 7.
238. Valentine, *supra* note 185, at 48-49.
239. *Id.* at 49.
240. *See supra* text accompanying notes 169-70.
241. Valentine, *supra* note 185, at 47.
242. Weber, *supra* note 227, at 4-7.
243. 374 U.S. 398 (1963).
244. 450 U.S. 707 (1981).
245. 374 U.S. at 404; 450 U.S. at 716-17.

mitting the birth of an infant with disabilities—a suit for wrongful birth. Or, as has happened, a physician may recommend amniocentesis, which results in abortion, only to find the aborted fetus was healthy—leading to a suit for wrongful death.[246]

The Supreme Court of Minnesota recently considered the interests of medicine and society in the context of a wrongful birth action in *Hickman v. Group Health Plan.*[247] In *Hickman*, a Minnesota statute which prohibited wrongful birth actions was declared unconstitutional by a county court. The state supreme court reversed, upholding the statute's constitutionality.[248] In considering the plight of the doctor when faced with a wrongful birth cause of action, the court wrote:

> What is the doctor's choice? By advising the patient about amniocentesis . . . there is as high as a 1 in 100 chance that the fetus will be injured . . .; by not advising about the test, there is as high as a 1 in 350 chance that the child will be born with mental or physical defects. With either alternative, the doctor would be subject to . . . suit. How could the court require the state to provide a cause of action against a doctor faced with this Hobson's choice? . . . [W]e cannot and should not place the doctor in an impossible situation, interfering with and perhaps thwarting his or her professional judgment. . . .
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> [D]octors must be returned some leeway in exercising judgment affecting the treatment of their patients without the fear of legal sanction.[249]

II. There Is No Common Law Basis for the Right to Recover for Wrongful Birth

The extension of the constitutional right of privacy to the abortion decision provided the gravamen for a wrongful birth claim—that the defendant's negligence precluded the parental choice of aborting the unborn child.[250] But it is the application of the common law tort framework which has provided the basis for judicial recognition of the claim.[251] Thus, a wrongful birth action

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246. Friedman, *supra* note 137, at 143 n.261.

247. 396 N.W.2d 10 (Minn. 1986).

248. *Id.*

249. *Id.* at 14.

250. Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 31 Def. L.J. 555, 561, 576 (1982); Note, *A Major Step Forward in the Evolution of Wrongful Life*, *supra* note 30, at 209; Comment, *Liability for Negligent Prenatal Diagnosis*, *supra* note 1, at 570.

251. *E.g.*, Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 467, 656 P.2d 483, 489 (1983); Park v. Chessin, 60 App. Div. 2d 80, 86, 400 N.Y.S.2d 100, 113 (N.Y. App. div. 1977), *rev'd in part sub nom.*, Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372, 377 (1975);

must meet the required elements of the standard negligence action: duty, breach, proximate cause, and damages.[252]

The adaptation of these elements to the wrongful birth fact pattern raises jurisprudential questions which cannot be addressed in detail within the scope of this article, but which nevertheless demonstrate that recognition of the wrongful birth claim entails more than mere application of established principles, and instead requires major revision of fundamental concepts of traditional justice.[253]

A. *Damages: When Is Life A "Wrong"?*

"The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party."[254] Thus, if a car is stolen, the remedy is to replace or restore the car to its owner. If a person has been injured, the best remedy is to provide treatment which restores the plaintiff's health, usually through the awarding of monetary damages for medical expenses. Where health or life cannot be restored, monetary damages are awarded to replace, as much as possible, the benefits the health or life would have provided.

Theoretically, it would be simple to restore plaintiffs to their original position in a wrongful birth or wrongful life action. The plaintiff child complains that he is alive and alleges that he prefers nonexistence. The plaintiff parents claim they are injured by hav-

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Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975).

252. *E.g.*, 46 N.Y.2d at 411, 386 N.E.2d at 811, 413 N.Y.S.2d at 899; 98 Wash. 2d at 467-68, 656 P.2d at 489.

253. Although a number of these questions are noted *infra*, several are not. Some examples: One underlying policy issue presented by the wrongful birth claim is who should bear the cost for the care and treatment of children with disabilities? Should the responsibility for infants with disabilities be shifted to the medical profession? What effects on the delivery of medical care, costs, and the health of others would result? When parents choose to procreate, do they assume some risk that they might bear children with disabilities, or have advances in prenatal diagnostic technology shifted the risk to health care professionals? Should social institutions, governmental or charitable, bear a greater responsibility for the care and the costs of persons with disabilities? Will wrongful birth liability detract from the incentive or impetus of such institutions to participate? If liability should be shifted, and viewing negligence law as a means of social engineering (*see* Pound, *Theory of Social Interests*, 15 *Pub. Am. Soc.* 16 (1920)), is common law tort liability the most desirable instrument to effect change?

254. United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958), *cert. denied*, 358 U.S. 899 (1958); *see also* Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867); Miller v. Robertson, 266 U.S. 243, 257 (1924) (contract); Tucker v. Calmar Steamship Corp., 356 F. Supp. 709, 711 (D. Md. 1973) (tort).

ing a living child, an injury which they would have avoided by abortion. The most effective and inexpensive remedy would be to kill the child.

Most segments of society would be abhorred by this suggestion,[255] and this social repugnance toward actually returning the plaintiffs to their original position points up the philosophic problems of the wrongful birth action. The various legal and philosophic arguments against killing the child—that he is a human being, that he has value, that the "remedy" is murder, that it is against the public policies behind criminal statutes and social welfare legislation, that it is discrimination against persons who are disabled, that it decreases respect for life in other areas, that it violates basic morals concerning the value of life, or violates the child's natural rights—are also arguments against the conclusion that the existence of a child with disabilities is a "wrong" or an injury.

Society's recognition of the intrinsic value of human life can be found in its philosophic and moral thought and its laws and social policies. Quality-of-life arguments do not stop at birth when undercutting these standards.

> '[W]rongful life' implies that an individual should never have existed; and a child's life, when characterized by severe pain and deprivation, can be an 'injury of continued existence.' On utilitarian grounds, and because of a positive duty to avoid harm, this argument provides for justifying euthanasia of small children for the sake of the children themselves.[256]

As the late Princeton University ethicist Paul Ramsey noted, it is impossible to think of a moral argument to justify elective abortion that cannot, with equal force, justify infanticide.[257]

Persons with disabilities are also intrinsically worthy, as recognized in "recent legislation concerning employment, education, and building access . . . [which] evidences a growing public awareness that the handicapped can be valuable and productive members of society. To characterize the life of a disabled person as an injury would denigrate both this new awareness and the handicapped themselves."[258] One study of twenty-five families with handicapped

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255. Although some groups, applying quality-of-life standards, might approve of some form of infanticide or euthanasia depending on the severity of the child's defect.

256. Reich, *supra* note 14, at 836.

257. Ramsey, *Reference Points in Deciding about Abortion*, in THE MORALITY OF ABORTION 79 (J. Noonan ed. 1970).

258. Smith v. Cote, 128 N.H. 231, 249, 513 A.2d 341, 353 (1986) (citing Comment, *Wrongful Life: A Misconceived Tort*, 15 U. CALIF. DAVIS. L. REV. 447, 459-460 (1981)).

children found that nearly every family concluded the experience with the disabled child was positive.[259] The values inherent in wrongful birth/life actions are diametrically opposed to traditional values in the common law. The idea that a child with disabilities "lead[s] a life that would better never have been lived, or that the parents are 'damaged' by that child's presence in their family," verbalizes a pervasive social prejudice against people with disabilities.[260]

Recognition of wrongful birth is a "slippery slope" which will lead to less respect for life in other quarters.

> [A] general willingness in society to abort a defective fetus strengthens the attitude favoring selectivity in accepting or rejecting nascent life. These fears, expectations, and attitudes of selectivity—which are enhanced by quality-of-life arguments and which serve as concrete criteria for the utilitarian benefit-harm calculus—will encourage and increasingly lead to abortion for lesser reasons and to infanticide in situations where parents have had no opportunity for prenatal diagnosis.[261]

Wrongful birth plaintiffs do not seek to be restored to their original position; thus, such claims are distinct from traditional tort claims which seek compensation in the usual manner. Historically, tort and criminal law have attributed a positive value to life. As the New Jersey Supreme Court has so eloquently stated:

> One of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life (citation omitted). Concrete manifestations of this belief are not difficult to discover. The documents which set forth the principles upon which our society is founded are replete with references to the sanctity of life. The federal constitution characterizes life as one of three fundamental rights of which no man can be deprived without due process of law. U.S. Const.,Amends. V and XIV. Our own state constitution proclaims that the 'enjoying and defending [of] life' is a natural right. N.J. Const. (1947), Art. I, 1. The Declaration of Independence states that the primacy of man's 'unalienable' right to life is a 'self-evident truth.' Nowhere in these documents is there to be found an indication that the lives of persons suffering from physical handicaps are to be less cherished than those of non-handicapped human beings. State legislatures—and thus the people as a whole—have universally reserved the most severe criminal penalties for individuals who have unjustifiably deprived others of life. Indeed, so valued is this commodity that even one who has committed first degree murder cannot be sentenced to death unless he is accorded special procedural protections in addition to those given all criminal defendants. . . . Again, these

259. Koop, *supra* note 166, at 20.
260. Valentine, *supra* note 185, at 52.
261. Reich, *supra* note 14, at 837; *see also* Koop, *supra* note 166.

> procedural protections and penalties do not vary according to the presence or absence of physical deformities in the victim or defendant. It is life itself that is jealously safeguarded, not life in a perfect state.[262]

One who causes a diminution of another's life, through injury, may be liable for compensation as well as subject to criminal sanctions. The ultimate wrong is to completely end another's life—to cause his non-existence.[263] "It is basic to the human condition to seek life and hold on to it however heavily burdened. . . .'For the living there is hope, but for the dead there is none.' Theocritus."[264] Wrongful birth rejects this hierarchy of values and posits the child's non-existence as the preferred, valued state, thus, a second distinction: wrongful birth claims apply a different value to life than traditional claims.

The quality of life rationale, employed to conclude that life with disabilities may be worse than no life at all, not only creates jurisprudential line-drawing problems, but also leads to problems of determining "damages." Quality of life criteria inevitably arise from unusual "hard cases" and are thus inherently unsuited for establishing or maintaining general standards.

> [Q]uality-of-life arguments are invariably put forth as the only 'reasonable' solution to a hard case created by a given medical prognosis or other set of medical circumstances. Because such arguments derive their persuasive force from the uniquely difficult facts of individual cases rather than from any argument that they are but the logical extension of long-established and accepted legal principles, a 'case-by-case' approach to decision-making which accepts the quality-of-life ethic as its starting point will inevitably have a negative incremental effect on existing law resting on a natural rights ethic.[265]

Additionally, "line drawing" based on the economic or social impact of various defects, rather than an absolute value of life, is complicated by the medical impossibility of determining with certainty the severity of fetal defects.[266] To truly determine the "quality" of the life in question, consideration should also be given to the life span, available treatment, the potential for medical ad-

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262. Berman v. Allan, 80 N.J. 421, 428-29, 404 A.2d 8, 12-13 (1979).

263. Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41, 46 (N.Y. Sup. Ct. 1968), *aff'd*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (N.Y. App. Div. 1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

264. Gleitman v. Cosgrove, 49 N.J. 22, 30, 227 A.2d 689, 693 (1967).

265. Destro, *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. CONT. HEALTH L. & POL'Y 71, 90 (1986).

266. Fletcher, *supra* note 154.

vances within the child's lifetime, the socio-economic status of the parents and their ability to cope with the handicap and afford treatment, and the societal attitude toward the disability and its treatment, not only at the time of birth, but over the course of the life being evaluated. Reich states:

> [T]he consequentialist ethic relies on the prediction of good and bad results, and those results depend on contingent factors such as emotional and social support for the handicapped. Hence this moral theory is vulnerable to arbitrary and static assessments. To minimize the problem of arbitrariness, consequentialist theories frequently use operational criteria; but these standards raise the objection of excessive quantification. For example, use of IQ scores as a quality-of-life criterion suffers from an excessive and elusive reductionism of human worth; and categorization of moral value of life according to syndrome—Down's syndrome, for instance—overlooks the fact that individuals afflicted with many such defects manifest a wide range of physical and mental capabilities and handicaps.[267]

Finally, even a quality of life rationale cannot exist in a vacuum, but must be based on an underlying determination, or absolute, which will dispose of cases that fall into a "gray" area or which, by mistake or lack of technology, slip through initial standards. That is, should the line be drawn with an ultimate goal to wipe out all defective lives, at the expense of also catching a number of "quality" children, or should the line be drawn with a premium on protecting all healthy children, to the point of allowing some impairments?

> The dilemma lies in deciding what value should be placed on the gains of terminating affected fetuses and the losses of killing normal fetuses. These cannot simply be weighted against each other in numerical terms. The value of terminating affected fetuses must depend on the likely degree of handicap and its effect on parents, their families, and society; some fetuses will be so severely affected that they will be stillborn or die soon after birth, in which case amniocentesis and termination cannot be said to have averted handicap. At the other end of the scale, some will be only mildly affected and have a prospect of almost normal lives.[268]

Speculation involved in measuring damages almost inevitably leads to the rejection of a wrongful *life* claim.[269] The infant plain-

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267. Reich, *supra* note 14, at 836.

268. *The Risk of Amniocentesis*, LANCET, Dec. 16, 1978, at 1288.

269. *E.g.*, Nelson v. Krusen, 678 S.W.2d 918, 924 (Tex. 1984); Smith v. Cote, 128 N.H. 231, 248, 513 A.2d 341, 352 (1986); Bruggeman v. Schimke, 239 Kan. 245, 252, 178 P.2d 635, 640 (1986); Elliot v. Brown, 361 So. 2d 546, 547-549 (Ala. 1978); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 694 (E.D. Pa. 1978); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 773, 233 N.W.2d 372, 376 (1975).

tiff asks the court to "measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination."[270] It is not simply the measure of damage that is precluded, but the determination of whether there is any damage at all. "Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."[271] One author, after thorough analysis of the court decisions recognizing wrongful life claims, concluded: "None of the courts granting a wrongful life claim has adequately provided a rationale for establishing injury. This inability demonstrates clearly that wrongful life does not fit into traditional negligence framework."[272]

Courts have also rejected wrongful *birth* claims because of the impossibility of determining if parents are actually damaged by the addition of a family member with a disability.[273] To judge the worth of a child with disabilities involves the weighing "of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood" against the "benefit" of not having the child.[274] Other courts have found the costs, care and treatment of a child with disabilities are certain, quantifiable expenses for which parents may recover.[275]

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270. Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967).

271. Becker v. Schwartz, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978).

272. Pace, *The Treatment of Injury in Wrongful Life Claims*, 20 COLUM. J.L. & SOC. PROBS. 145, 166 (1986).

273. 49 N.J. at 29, 227 A.2d at 693; Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503, 504 (1970) ("We note it would be virtually impossible to evaluate as compensatory damages the anguish to the parents of rearing a malformed child as against the denial to them of the benefits of parenthood."); Howard v. Lecher, 53 A.D.2d 420, 424, 386 N.Y.S.2d 460, 462 (N.Y. App. Div. 1976) ("When the parents say that the child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child."). *See also* Azzolino v. Dingfelder, 315 N.C. 103, 112, 337 S.E.2d 528, 534 (1985)(rejecting wrongful birth claim, noting that courts which have recognized the claim have failed to establish any concensus as to the measure of damages, which types of damages should be allowed, whether such damages should be offset by "emotional or other benefits accruing to the parents by reason of the life, love and affection of the defective child," and which, if any, steps should be required of the parents to mitigate damages, such as putting the child up for adoption).

274. 49 N.J. at 29, 227 A.2d at 693; 53 A.D.2d at 424, 386 N.Y.S.2d at 462.

275. *E.g.*, Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 482, 656 P.2d 483, 496 (1983) ("General damages are certainly beyond computation . . . [and] therefore incapable of satisfying the requirement . . . that damages be established with 'reasonable certainty.' . . . But " 'extraordinary expenses for medical care and special training . . . are calculable" and hence recoverable); Jacobs v. Theimer, 519 S.W.2d 846, 849, 850 (Tex. 1975) (court

The jurisprudential questions abound. Is the value of human life measured simply in economic terms, or should expenses be offset by the more abstract advantages of a unique life in the family? The logical flaw of measuring the value of life by actual, ascertainable expenses is that it begs the question of whether there is really injury, or net damage, to the claimant. For example, a person with no mode of transportation, when presented with the gift of a Mercedes, might claim "damages" of the costs of fuel and maintenance, as well as emotional distress of learning to drive and park, and of worrying about accidents, theft, insurance, speeding tickets, highway patrolmen, and all the responsibilities of owning an automobile. The automobile may even be defective as compared to other automobiles—it may require considerable repair, perhaps even fairly constant "treatment." It may never run as quickly, smoothly, efficiently, or as comfortably as other autos. Still, has the plaintiff been damaged by the gift? The determination involves a comparison to the original, auto-less state, not to the costs or qualities of other automobiles. Thus, the court decisions recognizing wrongful birth, cited above,[276] which measure damages by comparing expenses with those attributable to rearing a normal child, have not resolved the issue of whether damage has occurred. The first question, before measurement becomes an issue, is whether the plaintiff has been harmed.

Secondly, a careful perusal of these court opinions[277] reveals that the issue of offsetting benefits from the life of the child was not addressed, save for the *Berman* court, which held the benefits of

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objected to parents claim for damages for all expenses incurred in raising child and for mental or emotional anguish, as based upon "speculation as to the quality of life and as to the pluses and minuses of parental mind and emotion," but allowed recovery for the "economic burden [due] solely to the physical defects of the child," expenses reasonably necessary for the care and treatment of physical impairment); 46 N.Y.2d at 412-13, 386, N.E.2d at 813, 413 N.Y.S.2d at 901 (allowing recovery for ascertainable pecuniary expenses but not for psychic or emotional harm alleged to result from birth of impaired child); 69 Wis. 2d at 776, 233 N.W.2d at 377 (allows recovery for necessary expenses greater than costs occasioned by normal child, which can be established with reasonable medical certainty); 128 N.H. at 244-47, 513 A.2d at 349-51 (damages for emotional distress not recoverable but tangible pecuniary losses beyond ordinary child-raising costs allowed); Berman v. Allan, 80 N.J. 421, 432, 404 A.2d 8, 14-15 (1979) (expenses for treatment and care of child disallowed because parents "retain all the benefits inhering in the birth of the child—*i.e.*, the love and joy they will experience as parents," but recognizing claim for mental and emotional anguish suffered as a result of child's condition). *Cf.* Speck v. Finegold, 497 Pa. 77, 82, 439 A.2d 110, 112 (1981) (allowing damages for physical inconvenience attributable to child's birth *and* mental distress).

276. *Id.*

277. *Id.*

parenthood precluded recovery for related expenses, and that an award of medical and child raising expenses would not only be "disproportionate to the culpability involved," but would "constitute a windfall to the parents."[278]

As to the birth of a healthy child, most courts rule that child rearing costs are not recoverable, often after applying the "offset" rule to find the "intangible and incalculable benefits. . . are always greater than the costs of rearing the child."[279] Often the speculative, incalculable nature of child rearing costs themselves has been cited as a rationale for denying recovery.[280] Courts which fail to extend the "offset" rule to situations involving children with disabilities not only make a fundamental judgment as to the value of varying "qualities" of life, but also implicitly rule that the law regards the life of a healthy child differently than that of a physically or mentally impaired child.[281]

While the emotional stress associated with the birth of a child with disabilities may be greater than that of a nondisabled child, can it be said with certainty that such stress will outweigh the emotional benefits of rearing the child—the parental joy felt when a physically or mentally impaired youngster achieves new triumphs; and the patience, love, and bonding formed when working together through adversity? In this regard, the potential for emotional and spiritual benefits may be greater when raising a child with disabilities. "These intangible benefits, while impossible to value in dollars and cents, are undoubtedly the things that make life worthwhile. Who can place a price tag on a child's smile or the parental pride in a child's achievement?"[282] Or can it be said with certainty that the emotional and physical stress resulting from the birth of a disabled child will not be outweighed by the considerable long-term emotional and physical effects of the alternative, an abortion?[283]

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278. 80 N.J. at 432, 404 A.2d at 14.

279. Note, *Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages*, 53 FORDHAM L. REV. 1107, 1112 nn.32-33 (1985) [hereinafter Note, *The Avoidance of Consequences Doctrine in Mitigation of Damages*]; *see also supra* note 20.

280. Note, *The Avoidance of Consequences Doctrine in Mitigaiton of Damages*, *supra* note 279, at 1110; Scheid, *Benefits vs. Burdens: The Limitation of Damages in Wrongful Birth*, 23 J. FAM. L. 57, 93 (1984-85) [hereinafter Scheid].

281. *See* Capron, *supra* note 26, at 636.

282. Terrel v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

283. *See* Blumberg, Golbus, & Hanson, *The Psychological Sequelae of Abortion Performed for a Genetic Indication*, 122 AM. J. OBSTET. GYNECOL. 799 (1975); Barrett, Boehm, & Killam, *Induced Abortion: A Risk Factor for Placenta Previa*, 141 AM. J. OBSTET. GYNECOL.

Finally, as to pecuniary costs of child-rearing, it should be relevant when calculating offset that the parents initially desired or planned to have a child and were prepared to incur some degree of expenses, which should be deducted from the "costs" of the "wrongful" birth.[284] This does not mean that the benefits of a hoped-for normal child should be subtracted from the value of the child with disabilities because the comparison is not to a healthy child, but to the alternative of abortion.

The "benefit" rule of section 920 of the RESTATEMENT (SECOND) OF TORTS states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.[285]

There is some controversy as to whether the "same interest" language of this rule, as explained in comment B to section 920, would limit offsets of pecuniary costs to pecuniary benefits and offsets of emotional harm to emotional benefits. Courts have nearly unanimously rejected this narrow interpretation. The interest of the plaintiff can be seen broadly as a child-rearing or familial interest.[286] The Restatement seems to reflect the long-standing tort principle of *damnum absque injuria*—if the defendant's negligence fortuitously produces a good, then no cause of action arises.[287]

May society determine that life is intrisically more valuable than its absence, as a matter of fundamental social value and policy? For example, one such policy is based on the "emotional bastard" theory: that to allow parents to publicly proclaim, via a legal claim, that their child's life is an injury to them, it will have undesirable social effects, particularly on such children.[288] "This inquiry into the parent's perception of the value of the unwanted child may adversely affect the child's attitudes of self-worth and esteem."[289] "We do not believe that the law should provide a basis for . . . interfamilial warfare. It is obvious that the application of a 'wrong-

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769 (1981); New York State Department of Health Office of Biostatistics, *Effect of Induced Abortion on Subsequent Reproductive Function* (1980).

284. Capron, *supra* note 26, at 638, 639 n.91; Azzolino v. Dingfelder, 315 N.C. 103, 119-20, 337 S.E.2d 528, 539 (1985) (Exum, J., dissenting).

285. RESTATEMENT (SECOND) OF TORTS § 920 (1965).

286. *See Capron, supra* note 25, at 638, 639 n.91.

287. Scheid, *supra* note 280, at 98.

288. *See* Note, *The Avoidance of Consequences Doctrine in Mitigation of Damages, supra* note 279, at 1111.

289. Scheid, *supra* note 280, at 98.

ful life' doctrine would corrode family life."[290] The rationale behind this argument suggests a policy interest of larger scope—not merely prevention of psychological stigma to the child and harm to the family, but prevention of social prejudice against people with disabilities in general.

May a court determine as a matter of law that there is no net damage created by a birth, no matter how great the concrete economic costs? For example, the Illinois Supreme Court, in an opinion by Justice Ward, held that the benefits of having a healthy child far outweighed the costs, not based on any "benefits rule," but as a matter of public policy. "[T]he court pointed out that the parents would be placed in the unseemly position of proving in open court that their own child was a detriment. . . . [T]he court believed this would be destructive to the health of the child in particular and the family in general."[291] Should the life be valued by quality standards which rate disabilities by their objective value, or lack thereof, to society? Reich states:

> When the overall quality of life or categorical condition of life is the standard for the moral judgment on value of life, this relative criterion is at odds with the concept of the moral equality of all human beings and the fundamental principles of justice which undergird the ethical and legal protection of life in Western society.[292]

B. *Decisions: Who Holds The Scales?*

Should the evaluation be made by juries, left to the mythical "reasonable person," or should parents decide the ultimate value of life? Within the limits of the trimester formula, *Roe v. Wade* removed the power of the state to ascribe absolute value to an unborn child and passed the determination to the mother, as part of the abortion "choice."[293] Thus, it is possible to find, in one room of a hospital, surgeons battling heroically, using the best, most capital intensive, modern technology, to save the life of a baby born at the twenty-first week of gestation, while in the next room a surgeon quietly aborts a twenty-three-week-old fetus. This shifting of the value of life from objective standards to subjective decision-making assumes greater proportions in the wrongful birth claim. Consider these hypotheticals:

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290. Comment, *An Action for "Wrongful Life,"* 38 N.Y.U.L. Rev. 1078, 1080 (1963).
291. Scheid, *supra* note 280, at 94.
292. Reich, *supra* note 14, at 836.
293. Roe v. Wade, 410 U.S. 113, 163 (1973).

(1) Mrs. Doe has given birth to a child with disabilities and is on the way to see an attorney to file a wrongful birth claim. She plans to tell the jury that the life of her child causes her emotional distress as well as financial loss. A negligent driver strikes Mrs. Doe's automobile and kills the child. The attorney will now file a wrongful death claim, alleging that the negligent driver has deprived Mrs. Doe of the love, companionship, affection, patience, and joy the child brought to the mother.
(2) Mrs. Doe has learned that the child she is carrying suffers from disabilities. Dr. Luke provided this diagnosis too late for an abortion. Mrs. Doe has seen her attorney and has prepared a wrongful birth complaint to file as soon as the child is born. During delivery, Dr. Luke is negligent, resulting in the death of the baby. Instead of wrongful birth, Mrs. Doe sues Dr. Luke for wrongful death.

In these hypotheticals, Mrs. Doe is not necessarily advancing fraudulent claims. All that is required is an actual change in her subjective emotional state. Under the pressures of raising a child with disabilities, she may truly believe she has been injured, and might convince a jury that a reasonable person in her situation would have aborted the child given the requisite prenatal counseling. Upon losing a baby, she faces a different reality, and may "realize" the absence of her child is a real loss, with real emotional consequences. She may genuinely feel deprived of something of great value ("no matter what his condition, he was *my* baby") and may convince a jury of her injury.

Of course, these hypotheticals do demonstrate the potential for fraudulent claims. Wrongful birth "is a cause based on an after-the-event contingency which plaintiffs make operable by the operations of their minds."[294] Some courts have cited this potential as a policy reason for denying such claims.

> [T]he tort of wrongful birth will be peculiarly subject to fraudulent claims. The wrongful birth claim will almost always hinge upon testimony given by the parents after the birth concerning their desire prior to the birth to terminate the fetus should it be defective. The temptation will be great for parents, if not to invent such a prior desire to abort, to at least deny the possibility that they might have changed their minds and allowed the child to be born even if they had known of the defects it would suffer.[295]

Similarly, a New York court rejected the parent's claim, noting "allowance of recovery would place an unreasonable burden on physicians and obstetricians. It would either open the way for

294. Howard v. Lecher, 53 A.D.2d 420, 425, 386 N.Y.S.2d 460, 463 (N.Y. App. Div. 1976).

295. Azzolino v. Dingfelder, 315 N.C. 103, 113, 337 S.E.2d 528, 535 (1985) (citing Rieck v. Medical Protective Co., 64 Wis. 2d 514, 519, 219 N.W.2d 242, 245 (1974)).

fraudulent claims or enter a field that has no sensible or just stopping point."[296]

These examples illustrate major distinctions between traditional torts and the wrongful birth claim. First, the claim is inconsistent with the value of life implicit in the judicial or statutory recognition of the wrongful death claim, in which "[t]he presence of the child is being viewed in absolute terms as an overwhelming good."[297] More significantly, and more subtly, the traditional fundamental value of life may be determined, for purposes of attaching liability to the conduct of others, not by objective standards, but by the subjective value the mother chooses to assign to her child's life.

III. Conclusion

Wrongful birth and wrongful life causes of action must be distinguished from wrongful conception and wrongful pregnancy causes of action. In essence, wrongful conception/pregnancy actions fall within traditional common law torts relating to medical malpractice or negligence. They require no new legal theories. However, wrongful birth/life claims do require a new legal theory, in that life itself is considered a wrong, and death is preferred over life with disabilities. By deviating from the general principle, historically found in civilized law, that life, even with disabilities, is valuable and that only wrongful death is compensable, wrongful birth/life actions are a radical departure from fundamental legal philosophy.

Courts that have recognized wrongful birth/life actions have typically cited *Roe v. Wade* as the basis for this right of recovery. However, a Hohfeldian analysis demonstrates that the two "rights" involved are distinctly different types of legal relationships, such that the policy justifications and interest balancing of *Roe* do not compel the leap to the right to recover for wrongful birth/life. Moreover, the holding of *Roe* is sharply limited by its context—a consideration of a state criminal statute.

A utilitarian analysis of the competing interests involved in wrongful birth/life claims yields markedly different policy conclusions than those derived from an application of the utilitarian model to *Roe*. Wrongful birth/life liability results in financial pressure on physicians to employ defensive medicine and to advise prenatal screening and abortion. The social and medical pressures on

296. 53 A.D.2d at 425, 386 N.Y.S.2d at 463-63.

297. Scheid, *supra* note 280, at 95.

potential mothers to screen and abort creates the ethical problem of the over-kill of normal, healthy children.

In the wake of wrongful birth liability, the increased abortion of healthy and desired unborn children not only skews the parental right of reproductive choice, but also conflicts with the state interest in potential life. The interests of those leading lives with disabilities—to be treated with respect and not prejudice, and to be regarded as valued citizens instead of social evils—are undermined by a cause of action that proclaims a life with disabilities as a damage to one's self or others. The interests of medicine and society, in independent medical judgment and rights of conscience, are also violated by the intrusions attendant to wrongful birth/life liability. Thus, a jurisprudential analysis demonstrates that, even if the "rights" and "interests" balanced in *Roe* are accepted for the sake of argument, *Roe* does not justify wrongful birth/life causes of action.

Judicial recognition of wrongful birth/life claims often springs from an understandable sympathy for a difficult, but rare situation: parents who desired a healthy, robust youngster have instead given birth to a child with severe disabilities. But "hard facts make bad law." These rare cases should be solved with greater effort, both public and private, to help bear the costs of rearing the children with disabilities. If, for the sake of a few extreme situations, general values are shifted from the presumed intrinsic worth of life, upon which so much of the criminal and civil law is founded, the hard exceptions swallow the rule. The presumption favoring life is shifted to a snowballing policy that snuffs out normal unborn children in an effort to eradicate persons with disabilities. It is this implicit inescapable prejudice against individuals with disabilities in particular, and the unborn in general, that pervades the wrongful birth/life rationale. Neither this categorical prejudgment of the worth of others, nor an arbitrary subjective "choice" which determines whether human life is a blessing or a liability, should be clothed with the dignity of law through the recognition of wrongful birth and wrongful life claims.